U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 07 November 2003

CASE NO.: 2002-LHC-2752

OWCP NO.: 07-145388

IN THE MATTER OF:

FLOYD C. GARNER

Claimant

v.

CALCASIEU SHIPYARD

Employer

EAGLE PACIFIC INSURANCE COMPANY

Carrier

APPEARANCES:

JOHN McELROY, ESQ.
ED W. BARTON, ESQ.

For The Claimant

CHRIS A. LORENZEN, ESQ.

For The Employer/Carrier

BEFORE: LEE J. ROMERO, JR.
Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, et seq., (herein the Act), brought by Floyd C. Garner (Claimant) against Calcasieu Shipyard (Employer) and Eagle Pacific Insurance Company (Carrier).

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. Pursuant thereto, Notice of Hearing was issued scheduling a formal hearing on February 6, 2003, in Beaumont, Texas. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. Claimant submitted 30 exhibits, Employer/Carrier proffered 70 exhibits which were admitted into evidence along with one Joint Exhibit.

Post-hearing briefs were filed by Claimant and Employer/Carrier on or before the brief due date of May 5, 2003. On May 8, 2003, Employer/Carrier filed a response to Claimant's argument for Section 14(e) penalties. This decision is based upon a full consideration of the entire record. [1]

Based upon the stipulations of Counsel, the evidence introduced and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

I. STIPULATIONS

Claimant and Employer/Carrier stipulated (JX-1), and I find:

1. That Claimant was injured on August 11, 1997.

2. That Claimant's injury occurred during the course and scope of his employment with Employer.

3. That there existed an employee-employer relationship at the time of the accident/injury.

4. That Employer was notified of the accident/injury on August 12, 1997.

5. That Employer/Carrier filed a Notice of Controversion on October 1, 2002.

6. That informal conferences before the District Director were held on March 9, 1999, September 8, 1999, October 2, 2000 and July 30, 2002.

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[1] References to the transcript and exhibits are as follows: Tr.___; Claimant's Exhibits: CX-_____; Employer/Carrier's Exhibits: EX-___; and Joint Exhibit: JX-___.

7. That Claimant received temporary total disability benefits and medical benefits as reflected in EX-36, for which no summary was provided.

II. ISSUES

The unresolved issue presented by the parties are:

1. The nature and extent of Claimant's disability.

2. Whether Claimant has reached maximum medical improvement.

3. Claimant's average weekly wage.

4. Claimant's entitlement to and authorization for medical care and services pursuant to Section 7 of the Act.

5. Employer's entitlement to a credit for overpayment of compensation.

6. Attorney's fees, penalties and interest.

III. SUMMARY OF THE EVIDENCE

The Testimonial Evidence

Claimant

Claimant was 40 years old at the time of the hearing in this matter. He is a high school graduate. (Tr. 23). He has had no vocational training or additional formal education, holds no licenses and is not certified in any trade or profession. (Tr. 24). His past work has been in general labor, plumbing and as an outside machinist mostly in shipyards. (Tr. 27).

Claimant began working for Employer on March 23, 1997, as an outside machinist making $8.50 an hour and received one raise to $9.00 an hour. (Tr. 30-31). He worked a minimum of five days a week in Corless, Louisiana, which was 45 miles from his home. (Tr. 34). His duties involved "pulling props off of the push boats with ten to twenty ton chainfalls," pulling shafts out, changing bearings and hydraulic pumps, scraping barnacles off the bottoms of barges, building scaffords and "basically had to do everything." He was required to lift 50 to 100 pounds. (Tr. 32). He estimated 40-50 percent of his work was performed in confined spaces where he had to bend over. He had to climb ladders every day with a lot of pushing and pulling of objects weighing 50 to 100 pounds. He worked overtime 80 percent of the time. (Tr. 33).

On August 11, 1997, Claimant, J. D. Malone (Captain of the boat) and John Silene were changing a roller pin out, which weighed an average of 400 to 500 pounds, when Claimant felt a "popping in the middle to the upper part of my back" while lifting the roller pin. (Tr. 35-36). Claimant described the popping as "like hot knives, matches burning under your finger." Claimant stopped working that afternoon and went to the machinist shop to report the incident to Ricky Benson, "second in charge." (Tr. 36).

Claimant testified that his condition changed dramatically overnight. His back was "tense and hard. And I had tons of muscle spasms and everything." (Tr. 37). He described his back pain as located between his shoulder blades "and down just a little bit." (Tr. 38). The morning after the accident Employer sent him to Dr. Ramos in West Lake, Louisiana, who took X-rays and prescribed therapy three times a week and returned Claimant to light duty. Claimant stated physical therapy provided only temporary relief. He attempted to return to light duty, but was only able to work two to three days in a period of one week. Claimant reported his problems to Dr. Ramos who referred him to Dr. James Perry in Lake Charles, Louisiana. (Tr. 40).

Dr. Perry, an orthopedist, examined Claimant and ordered an MRI. Claimant understood his problems included "impinging abnormalities, extrusion of the disc." He saw Dr. Perry three or four times. Dr. Perry referred Claimant for a second opinion from Dr. John Razzio, a neurosurgeon. Dr. Perry took Claimant off of all work and, to Claimant's knowledge, never released him to return to work. (Tr. 41-42).

Dr. Razzio performed a myelogram and recommended surgery. Claimant stated he had undergone all his blood work in preparation for surgery, but surgery was never authorized by the insurance carrier. (Tr. 42-43). Dr. Razzio did not release Claimant to return to work. (Tr. 43). Claimant stated that he was willing to undergo the recommended surgery. (Tr. 54-55).

Carrier sent Claimant to Drs. Fillmore, Larkins and Angel for evaluation, but scheduled such examinations six months to a year later. (Tr. 43-44). Claimant testified that while he waited for the physician consultations, he continued to have the same problems. Drs. Larkin and Angel did not discussed their findings with Claimant nor did they release him to return to work or assign any physical restrictions. (Tr. 44-45). Claimant was not allowed to have the surgery recommended by Dr. Razzio.

Claimant began treating with Dr. Grover for pain management. Dr. Razzio had recommended he seek pain management. Claimant

stated he was still having the "burning feeling of a match, the stabbing feeling of a hot ice pick or a knife being stuck in the middle to the upper part of my back, with radiating pains going around to the right and left side." Dr. Grover provided medication treatment with Lorcet and Flexeril. (Tr. 46). Dr. Grover performed "numerous injections," which provided little relief, and two laser procedures. Dr. Grover also prescribed Oxycontin. (Tr. 47). Dr. Grover restricted Claimant from lifting more than ten pounds, walking and sitting for only short periods of time, reduced driving time and no climbing. Dr. Grover never told Claimant he should go back to work. Dr. Grover wanted to perform a left-sided laser procedure, but authorization was denied. (Tr. 49). Claimant testified that he would like to have the procedure performed. (Tr. 54).

Dr. Grover referred Claimant to Dr. Carlos Hernandez, a psychiatrist, and Dr. Guy Clifton, a neurosurgeon. Claimant testified that Dr. Clifton wanted to do surgery, but surgery was not authorized. Dr. Clifton did not assign any physical restrictions or release Claimant to return to work. (Tr. 48). Claimant testified he was willing to undergo the recommended surgery. (Tr. 54-55).

Dr. Hernandez has prescribed medication for Claimant's anxiety, depression, suicidal thoughts and lack of self-esteem. Claimant reported that he had some of these psychological problems before his job injury, but the symptoms became worse after his injury. (Tr. 51). Claimant stated that the medications prescribed by Dr. Hernandez have helped reduce his anxiety level and he can concentrate "a little more" and his general overall appearance and attitude is better. However, Carrier stopped paying for his treatment with Drs. Hernandez and Grover in June or July 2002. (Tr. 52-53).

Claimant testified that he has been able to continue treating with Drs. Hernandez and Grover with help from his attorney's office. His mother has assisted with purchases of prescription medications. (Tr. 53). Claimant testified that without his medications prescribed by Dr. Grover he will be very limited and "it would just be real hard. It would be tremendously hard to make it through the day without some kind of relief, other than just the muscle stimulator." Without the medications prescribed by Dr. Hernandez, Claimant stated he would feel jittery and very depressed and suicidal at times.

Claimant testified that he was evaluated by Dr. Levinthal who performed an independent medical evaluation at the request of Department of Labor. Dr. Levinthal informed him that his

preference would be that Claimant not have surgery until he was totally immobile. Dr. Levinthal did not discuss physical restrictions with Claimant nor release him to return to work. (Tr. 55).

Claimant testified that he has not taken any medications in a manner other than as prescribed by his treating physician. Drs. Grover and Hernandez have not told him he is taking too much of any particular medication. He was evaluated by Dr. Degner at the behest of Carrier to determine whether he needed to enter detoxification. Dr. Degner concluded Claimant was not a candidate for his drug and alcohol abuse counseling center. (Tr. 56, 58). Claimant testified that Dr. Grover took him off Oxycontin, but did not substitute any other medications. Claimant stated he did not notice any adverse effects after being taken off Oxycontin. (Tr. 57).

Claimant recalled being evaluated by Dr. Fillmore on two occasions, first based on a referral by Dr. Grover and secondly at the request of Carrier. Dr. Fillmore did not assign any physical restrictions nor release Claimant to return to work. (Tr. 60).

Claimant attended two functional capacity evaluations (FCEs), the first in 2000 at The Pain Care Center as part of a pain management program, which took one day to complete, and secondly in 2002 at the behest of the Carrier. He provided his best effort during both functional capacity evaluations. (Tr. 61-62). Claimant testified that the 2002 FCE "tore his back up," causing pain "like every other day" and affected him for three or four days thereafter. (Tr. 62-63).

Currently, Claimant has radiating pains daily from his back around to both sides. He has "the burning feeling in the middle of [his] back, middle to upper part of my back between my shoulder blades." He described a "stiffness, throbbing" pain underneath his ribs. Some days are better than others, but cold and wet weather affect his condition. (Tr. 63).

He stated activities around the house, such as cooking, vacuuming, washing dishes, folding clothes and raking outside cause him problems. (Tr. 64). He estimated he could perform these functions for only minutes at a time. He can walk three to five hundred feet. He has problems with arm extension while driving and experiences a "stabbing feeling and burning feeling with [his] arms extended out to the steering wheel." (Tr. 65). He can ride or drive for ten to fifteen minutes. (Tr. 66). He obtains relief from his pain with "a lot of Bio-freeze [an icy-hot gel] and I use my muscle stimulator tremendously." He currently takes medications

consisting of Narco, Flexeril, Seroquel and Depakote. (Tr. 67). He takes the medication as prescribed. (Tr. 68).

Claimant described his physical restrictions assigned by his doctors as no climbing, walking short distances, no crawling, no bending, some squatting and no lifting over ten pounds. He has not returned to any kind of work since he tried light duty in 1997. He does not ride horses, mow grass or play or coach baseball and football since his injury. (Tr. 69-70). He testified that his pain wakes him at night and stays with him throughout the day. He estimated he could stand for 20 minutes before developing problems and can sit for five minutes before alternating positions. (Tr. 71).

Claimant stated he injured his right knee before August 1997 while working for S&T International. He underwent arthroscopic surgery, recovered and returned to work. He also sustained a lower back injury in 1985 or 1986 while working for S&S Enterprises, but his back problem "seemed to get better" and he could not recall having any back problems before his August 1997 injury. (Tr. 72-73).

Claimant testified that he could not return to work as a machinist because of having to pull chainfalls, sling 18-pound ball hammers and carry a tool box weighing 40-60 pounds up a gangway, down ladders and descend tanks. (Tr. 73). Because of his physical problems, Claimant did not believe he could perform any on his past jobs which were intensive labor requiring physical activity and exertion. (Tr. 74).

Claimant acknowledged having been discharged from a polisher job because of absenteeism relating to a medical problem and from a laborer position with the sewerage and water department in the City of Pinehurst for flunking a drug analysis test for marijuana. (Tr. 75, 89-91). He affirmed that he noted on an insurance application he was a "recovering addict" from the use of marijuana and sought support through groups such as Alcoholics Anonymous (AA) and Narcotics Anonymous (NA). (Tr. 76). Claimant declared that he did not have an alcohol drinking problem. No doctors have ever told Claimant that he had problems with abusing alcohol or marijuana. (Tr. 77). He further acknowledged that since beginning with Narcotics Anonymous he has used marijuana. He has used marijuana since his work injury "periodically" once a week, "three or four times –-five times a month, maybe." Dr. Grover never asked him about his marijuana use, but he reported his marijuana use to The Pain Care Center before drug testing was performed. (Tr. 78). He testified that he completed a questionnaire for The Pain Care Center on which he reported no use of drugs or alcohol. (Tr. 79).

Claimant participated in counseling voluntarily to better understand Attention Deficit Disorder (ADD) and anger in relationship to his son who has ADD. He and his wife also voluntarily participated in marriage counseling and anger management classes to better understand how to deal with corporal punishment relating to their son. (Tr. 80-81).

He participated briefly in a Department of Labor sponsored rehabilitation program in 1999 which was closed because of existing medical disputes in his claim. Claimant has not applied for any jobs since his August 1997 job injury because he does not feel capable of performing a 40-hour work week. (Tr. 82). He stated that at a minimum of two to three days a week he cannot get out of bed because of his back. Depending on his daily activities, he may sit or lie down "half the day" ranging "from ten to 40 times a day." (Tr. 83). He testified that his back pain has eased but never stopped since his August 1997 job injury. Even if he felt capable of going to get a job, he would not do so because he does not feel his back could "hold up to" work duties. (Tr. 84).

On cross-examination, Claimant acknowledged he complained of back pain for one and one-half years after his 1985 back injury and received workers' compensation benefits for his injury. (Tr. 85-86). Claimant did not undergo surgery for his back problems in 1985 or 1986. (Tr. 86). Claimant affirmed he was still wearing a back corset 13 months after his 1985 back injury and still undergoing physical therapy. (Tr. 87-88). He confirmed that his back pain from the 1985 incident never totally went away and at times he still has such back pain. (Tr. 89).

Claimant stated he was off work for eight months from his knee injury in 1996 and continued to have pain after his surgery. (Tr. 93-94). Claimant testified he stopped smoking cigarettes on December 12, 1988 and disputed a note contained in a Pain Care Center report in 2000 that he was cutting his smoking back to five cigarettes a day. (Tr. 96). He stated Dr. Grover was not aware of his seeking support from NA and AA before prescribing Oxycontin. (Tr. 97).

Claimant did not report to Dr. Grover that he never drives. He admitted he gave maximum effort in his July 15, 2002 FCE, but also informed the therapist it hurt him to lift a cup of coffee. (Tr. 98).

Claimant testified he noticed a lot of difference when he stopped taking Oxycontin in his level of pain, which worsened. (Tr. 101). Claimant described his daily activities as driving his children to school on occasion, washing dishes, picking up and

doing some laundry. He stated he has to stop and rest during the day "to let my back ease up." He stated he was "hurting right now" during his testimony and that he is "always in pain." (Tr. 107).

On re-direct examination, Claimant clarified that his lifting a cup of coffee caused problems because of the extension of his arm, not the weight of the cup of coffee. (Tr. 110).

Francisco Perez, Ph.D.

Dr. Perez is in the private practice of clinical psychology and neuropsychology. (Tr. 112). He is board-certified by the American Board of Professional Psychology with a specialty in clinical neuropsychology. He is also board-certified by the American Academy of Pain Management. (Tr. 113; EX-49, p. 2).

Dr. Perez explained that pain management involves a multi-disciplinary approach to the management of pain complaints. A psychologist's contribution is twofold: to assess any issues associated with pre-pain complaints such as personality problems, addictive behavior patterns and to teach the person some behavioral techniques of managing pain. (Tr. 113-114).

Dr. Perez, at the request of Counsel for Employer/Carrier, evaluated Claimant on December 5, 2001. He reviewed Claimant's past employment and medical records in connection with the evaluation. (Tr. 115-116). He conducted a clinical interview of Claimant, administered a battery of tests consisting of an intelligence test, academic test, personality test and health assessment test, which are accepted testing in the psychology profession to evaluate individuals who present with pain complaints. (Tr. 116-117; EX-37, p. 6).

Based upon reasonable psychological probability, Dr. Perez opined he found evidence that Claimant presents behaviorally with a tendency to engage in symptom magnification, which is a drug-seeking behavior and Claimant had become dependent on Oxycontin. (Tr. 117). He also concluded that Claimant has a history of chronic patterns of behavior similar to the ones exhibited at the time of his assessment. He further determined that Claimant would be difficult to manage because of secondary gain factors. He acknowledged that he **could not** render an opinion whether Claimant's pain was related to his August 11, 1997 accident/injury because the conclusion is a medical and psychological determination. (Tr. 118).

He testified that various physicians concluded Claimant's complaints were out of proportion with the objective physical

findings, which is consistent with his psychological findings. (Tr. 119). He further opined that Claimant's behavioral pattern is shown in Dr. Haig's records from 1986 where he could not identify any significant aspects to explain Claimant's pain complaints, and a second injury in 1996 where Drs. Reed and Clark reached a similar opinion. (Tr. 119-120). Dr. Perez, however, inconsistently opined that he **could** state, within reasonable psychological probability, that Claimant's complaints of pain are not related to the August 11, 1997 incident based on the medical facts and his psychological assessment. (Tr. 121).

Dr. Perez testified that Claimant endorsed items in an exaggerated manner in the Minnesota Multiphasic Personality Inventory-II (MMPI) which produced an invalid profile. (Id.; EX-37, p. 6). Claimant's responses to the Young Clinical Axial Inventory also produced a profile of questionable or marginal validity which was consistent with the MMPI and raises a question of a chronic pattern of psychological maladjustment. (EX-37, p. 6). Claimant's behavioral health inventory produced a profile indicative of issues associated with substance abuse, addictive behavior patterns, impulse control problems and "emotional discontrol." Dr. Perez noted concern regarding anger issues involving threats made by Claimant to his wife and various physicians. (EX-37, pp. 6-7). Dr. Perez opined that Claimant's presentation was inconsistent and associated with deception in that Claimant reported he had never had a previous back injury and never used drugs. (Tr. 122; EX-37, p. 1).

Dr. Perez testified that Claimant's exaggeration of pain is a deception and his last functional capacity evaluation revealed he was a type-three symptom magnifier, which is the highest level of symptom magnification. According to Dr. Perez, Claimant's deception pattern is a behavior to seek gains such as not answering Dr. Grover's questions regarding addictive behaviors in the past and denying a history of substance abuse at The Pain Care Center, but testing positive for marijuana. (Tr. 123).

Dr. Perez further opined, within psychological probability, that Claimant's pain complaints have a behavioral basis to obtain secondary gains, since certain physicians have determined that such complaints have no medical basis. He stated Claimant's behavior was pre-existing. (Tr. 127). Dr. Perez testified he found no evidence of depression in Claimant. (Tr. 128).

On cross-examination, Dr. Perez acknowledged that he did not have any medical records from Drs. Raggio or Perry, but only a summary of the records. He was aware that initially either or both physicians had recommended surgery related to Claimant's condition,

but three neurosurgeons disagreed with the recommendation. (Tr. 131). He affirmed that the medical records indicate the physicians cannot explain the degree of pain of which Claimant is complaining based on the physical findings. (Tr. 134). Dr. Perez opined that Claimant's pain complaints were related to motivational factors and characterological personality factors, adding the only thing "keeping him from going back to work is not physical, it's his pain complaints." (Tr. 135).

Dr. Perez testified that only after inquiring about previous testing or treatment did Claimant inform him about prior anger management. (Tr. 135-136). Claimant did not deny prior anger management. (Tr. 136). Although Claimant had reported he was a recovering addict, relating to marijuana use, he further reported no history of criminal offenses for drug usage. (Tr. 137-138).

Dr. Perez confirmed that in response to testing questions Claimant endorsed statements such as "I'd like to kill one of the doctors that [he] had seen" and "killing people who have caused him problems." However, Dr. Perez was not aware of any particular health care provider or physician to whom Claimant had made a threat. (Tr. 143-144).

Dr. Perez affirmed that he cannot state Claimant is not suffering from pain as a result of his job injury, but can state his complaints are out of proportion with his objective physical findings and are consistent with obtaining secondary gains. (Tr. 148-149). He further testified Claimant's secondary gain is consciously, rather than unconsciously, motivated. His opinion is based on Claimant's non-responsiveness to any type of treatment despite very minimal to no physical findings. (Tr. 149).

Dr. Perez recommended that, from a psychological standpoint, narcotics should not be used with Claimant and it "will be dangerous to continue prescribing narcotic medication because of this man's addictive behavior pattern. It will not be in his best interest." (Tr. 150). His assessment identified Claimant's pain complaints as behavioral and not physiological which were leading to reinforcement of an addictive behavior pattern that has been present for a long time. (Tr. 152). He stated Dr. Grover was reinforcing Claimant's pain behavior by reinforcing the relief through narcotics use. (Tr. 155). He opined that Claimant is not going to achieve a medical solution to his situation because the consensus of physicians cannot identify a medical problem that can be treated. (Tr. 157-158).

Dr. Perez stated that of all the physicians who have treated and evaluated Claimant only he and Dr. Fillmore have opined that Claimant can return to his former employment. (Tr. 158).

William L. Quintanilla

Mr. Quintanilla, a licensed vocational rehabilitation counselor, performed a vocational assessment of Claimant at the request of Employer/Carrier. (Tr. 163). He met with Claimant on September 12, 2002, to discuss his injury, social history, educational background and previous employment history. (Tr. 163-164; EX-38). He was asked to identify employment for Claimant in the Golden Triangle area. He assumed restrictions of working in the light category of work which followed the functional capacity evaluation of July 15, 2002. (Tr. 164). He prepared a vocational assessment on October 25, 2002 (EX-38) and an addendum report on January 6, 2003. (EX-39).

He identified generic sedentary and light category jobs which Claimant should be capable of performing. The jobs would allow alternate sitting, standing and walking. The general jobs included order clerk, surveillance system monitor, dispatcher, sorter, assembler, hotel desk clerk, clerical checker among others. (EX-38, p. 7). No specific jobs demands or requirements were identified for the jobs.

He performed a historical survey as well as a current survey as of January 6, 2003. (Tr. 164). The historical survey was based upon a review of jobs advertised in local newspapers commencing July 1, 1998. The jobs are open on an ongoing basis and are readily available "all the time." Such jobs included a greeter position, counter sales representative, noncommissioned security officer and ticket seller. No specific job demands or requirements were identified for the jobs. (EX-39, p. 3). He explained noncommissioned security officer jobs as those which do not require the employee to carry a weapon or subdue anyone, but to reference monitors or gate entries. (Tr. 165-166). In 1998-1999, these security officer positions paid wages in the range of $5.16 to $7.00 an hour. He testified the jobs listed in his addendum report are positions for which Claimant could qualify within light restrictions. (Tr. 166; EX-39, pp. 2-3).

Of the jobs identified on January 6, 2003, he found a "light" assembly worker position at Alamo Cleaners in Beaumont, Texas paying $5.50 an hour. The worker matched clothing to tickets while standing at a table, but may receive some accommodation by using a stool. (Tr. 178-179). He also located a light cashier job at Longhorn Travel Plaza in Vinton, Louisiana, ten to 15 miles from

Claimant's residence. The job required no lifting and allowed sitting "on their off time, or whenever things are slow, they can take a break and sit in these chairs." The wage was $5.75 per hour. (Tr. 168; EX-39, p. 4).
No other specifics of the jobs were identified.

On cross-examination, Mr. Quintanilla acknowledged that no physician had set any restrictions for Claimant as of July or August 1998. (Tr. 170). Although Dr. Angel had determined that Claimant had reached maximum medical improvement as of July 1, 1998, he had also recommended continuing medical treatment of pain management and injections. (Tr. 170-171). For the historical survey, Mr. Quintanilla testified he used the most conservative vocational profile he could use which was sedentary to light work with alternate sitting, standing and walking. (Tr. 173-174).

He explained that the Longhorn Travel Plaza had two vacancies available at the time of his search, a maintenance position which required lifting of 50 pounds and stocking the store and the cashier position which did not require any lifting. (Tr. 175-176). He stated he did not consider any limitations on the use of arms or holding arms out, reaching out or overhead because the work in both jobs was "right directly in front of him." (Tr. 177).

William Joseph Kramberg

Mr. Kramberg, a vocational rehabilitation counselor, was employed by Counsel for Claimant to make an assessment of whether Claimant was able to return to work in any of the jobs identified by Mr. Quintanilla. (Tr. 184). He prepared an initial assessment on January 17, 2003 (CX-23) and a supplemental report on January 31, 2003. (CX-30). He opined that none of the jobs identified by Mr. Quintanilla in July-August 1998 would have been appropriate for Claimant at that time. (Tr. 185).

He stated the noncommissioned security guard positions at Burns International Security Services and Delta Security, Inc. required state licensing achieved only through testing for which Claimant would have to train and pass the examination before given an opportunity for hire. The Beaumont Enterprise's security position was a contracted position with an outside agency and there were no such in-house security positions. (Tr. 185-187; CX-30, pp. 1-2).

Mr. Kramberg testified the ticket seller job for the City of Beaumont was a part-time position and the prospective employee must be able to accept and make change at a fast pace. (Tr. 186; CX-30, p. 2).

The Hertz Rent-a-Car counter sales job was also part-time paying "a little above minimum wage" and preferred a prospective employee with 20-words a minute word processing ability and good people skills. (Tr. 186-187). Hertz reported no openings for almost one year with low turnover. The opportunity to alternate sitting and standing was dependent upon how busy they were during operations. (Tr. 187; CX-30, pp. 1-2).

Mr. Kramberg opined that based on Claimant's limited skills it would be less probable that an employer would have hired him in July-August 1998 if they knew he was undergoing continuing medical treatment for injuries from another job. (Tr. 188).

Mr. Kramberg followed-up on the Longhorn Travel Plaza cashier job and determined it was not appropriate for Claimant. He spoke with the facility manager who related that there were no openings, having hired someone before Christmas 2002. The job required mostly standing and an employee could sit only on breaks. The employee received minimum wage, had to make change at a fast pace and was required to lift 50 pounds to do stocking. (Tr. 189). He did not discuss a maintenance job or its requirements with the manager and had no reason to do so.
He stated the requirement to lift 50 pounds and sit only on breaks are inconsistent with Claimant's last functional capacity evaluation. (Tr. 190; CX-30, p. 2).

Mr. Kramberg also opined that the assembly worker position at Alamo Cleaners was not appropriate for Claimant since it was described as fast-paced and required the employee to be on his feet all day. Sitting was allowed only at lunch break. The employee needed to be able to read quickly and handle (inspect and match) about 220 garments an hour. (Tr. 191; CX-30, p. 2).

On cross-examination, Mr. Kramberg affirmed that he could not state that individuals with Claimant's reading and spelling skills or lesser skills have not passed the examination for security guard licensing. (Tr. 194). He acknowledged that he did not inquire whether Longhorn Travel Plaza or Alamo Cleaners would make accommodations for a prospective employee. (Tr. 195). He testified Claimant's return to work was "guarded" and not within vocational probability given the length of time since he had worked, his limitations, lack of transferrable skills, academic deficits, chronicity of his pain, coupled with essentially restrictions to sedentary and a "very much reduced range of light exertional activity work." (Tr. 197).

Claimant's Past Medical Records

Dr. Martin Haig

Dr. Martin Haig, an orthopedic surgeon, examined Claimant in August 1985 for low back complaints from a May 28, 1985 work injury, for which a CAT scan was performed revealing spondylolisthesis. (EX-19, p. 1). Dr. Haig opined that if Claimant is well-motivated he could return to work in 4-6 weeks. (EX-19, p. 1).

Subsequently, Claimant had to be hospitalized for traction from August 28, 1985 to September 9, 1985. (EX-19, p. 2). In October 1985, Dr. Haig reported that Claimant was "not serious enough or sick enough to have surgery. I strongly recommend that some type of settlement be made in this case . . . so that [Claimant] can proceed with changing his life . . ." (EX-19, p. 5). In December 1985, Dr. Haig again urged settlement of the claim and assigned a 10-15% disability to Claimant's back due to his May 1985 job injury. (EX-19, pp. 6-7). Dr. Haig continued treating Claimant conservatively through March 1986 when he opined Claimant could return to light-type occupations, if well-motivated, but not his former heavy work as a laborer. (EX-19, p. 9).

Dr. Jerry D. Clark

Dr. Clark's records reveal that Claimant was initially examined on May 20, 1986 for his work injury of "May 17, 1985" while throwing sand with a shovel. Claimant reported pain in his back from his shoulders to his hips and down his right lower extremity. Claimant was seen by Dr. Craig and later by Dr. Martin Haig who treated Claimant with medications, muscle relaxants, but no physical therapy. His X-rays, CT scan and a bone scan were negative. The only abnormality seen by Dr. Clark was a unilateral spondylolysis on the left at L-5 for which he injected ACTF and prescribed medications and therapy. (EX-18, pp. 1-2). Dr. Clark referred Claimant to Dr. Rafes for a second opinion.

Dr. Clark treated Claimant on two visits in June 1986, on August 27, 1986 and September 12, 1986, noting "all of his tests have been negative." He released Claimant restricting him to "ground work," because all of his tests had been negative and he was capable of returning to work. (EX-18, p. 3).

Dr. Earl H. Rafes

Dr. Rafes, a neurosurgeon, examined Claimant on July 8, 1986 and July 15, 1986, for chief complaints of pain down his low back at "D7 or D8", through his legs and numbness and tingling into his lower hips on sitting, after a work injury while shoveling sand. (EX-16, p. 1; EX-18, p. 14). X-rays of the thoracic and lumbar spine were obtained which were entirely within normal limits, except for spondylolysis at L5-S1. There was no evidence of a herniated disc on the CT scan. Claimant's thoracic spine was considered normal. (EX-16, pp. 4-6).

On July 15, 1986, Dr. Rafes opined that there was no reason to do anything further except to treat Claimant on a conservative orthopedic basis. He noted "medico-legal factors may be playing a part in this case." (EX-16, p. 7; EX-18, p. 15).

Sports Medicine Clinic of Southeast Texas

On June 10, 1996, Claimant was evaluated by Dr. Jack McNeill after twisting his right knee in a job accident on May 28, 1996. X-rays were negative but Claimant had tenderness medially and slight swelling. Dr. McNeill opined that Claimant had a torn meniscus and requested an MRI. (EX-20, p. 20; See EX-29, pp. 3-10).

A June 18, 1996 MRI revealed a Grade III tear of the posterior horn of the lateral meniscus. (EX-18, p. 21). On June 20, 1996, Dr. Jack McNeill recommended an arthroscopy of the right knee. (EX-18, p. 32; EX-20, p. 21).

On July 16, 1996, Claimant was treated by Dr. "Buck" Reid for a job injury to his right knee on May 28, 1996. Dr. Reid agreed that an arthroscopy would be an appropriate treatment for the right knee injury. (EX-18, p. 26). Dr. Reid performed the surgery on August 21, 1996. (EX-18, p. 32). On December 3, 1996, Dr. Reid noted that Claimant was three months post-surgery and claimed he was "about the same, if not a little worse." Dr. Reid commented "I found very little in his knee at the time of surgery and I suspect compensationitis." (EX-18, p. 28).

Dr. Reid suggested a second opinion which was rendered by Dr. David Teuscher on December 10, 1996, who had no clear understanding "as to exactly why this gentleman should have such anterior knee pain as he does." He had no objective basis to assign any work restrictions. (EX-18, p. 40).

Claimant continued in follow-up with Dr. Reid until released on March 4, 1997. (EX-18, p. 29). On June 2, 1997, Dr. Reid conducted a final evaluation and permanent impairment rating of Claimant. Using the AMA Guides to Permanent Impairment, Dr. Reid assigned a total lower extremity impairment of 16% which equated to a 6% whole person impairment. (EX-18, p. 48).

As noted by Employer/Carrier, less than two months after being assessed a final disability rating for his 1996 work injury, Claimant was involved in his August 11, 1997 work injury.

The Current Medical Evidence

Dr. Ramos

On August 12, 1997, Claimant was examined by Dr. Ramos in Westlake, Louisiana. Claimant informed Dr. Ramos that he was injured on August 11, 1997, while assisting in lifting a roller pin which weighed about 300-400 pounds when he felt a pop in his back. Dr. Ramos diagnosed an upper back strain and returned Claimant to modified work. (CX-20). Claimant was apparently treated with medications and physical therapy. (CX-16, p. 1).

Dr. James D. Perry

On September 15, 1997, Claimant was examined by Dr. Perry, an orthopedist. Claimant reported an injury after lifting a heavy object at work on August 11, 1997. Claimant informed Dr. Perry that he developed pain immediately with numbness and tingling in his right leg and pain in his right heel. He was only slightly better after physical therapy. Claimant complained of pains that radiated from his mid-back around his ribs. Claimant denied any past history of neck/back pain or injury. (CX-16, p. 1).

On physical examination, Claimant's lumbar spine had a 50% decrease in range of motion with flexion, but extension and bending were normal. There was no spasm, tenderness or deformity noted. Neurological testing was normal and X-rays were negative. Dr. Perry recommended a thoracic MRI to rule out thoracic radiculopathy. (CX-16, pp. 2-3).

On September 24, 1997, Claimant was again examined by Dr. Perry. His neurologic exam was stable and he was "essentially just having pain." The thoracic MRI revealed an abnormality which Dr. Perry opined could be associated with pain. (CX-16, pp. 5-6; EX-5). He recommended that Claimant seek a second opinion from Dr. Raggio. (CX-16, p. 4).

On October 3, 1997, Dr. Perry took Claimant off work until October 7, 1997, and on October 9, 1997, prepared a note stating Claimant is not able to return to work from September 29, 1997 through October 14, 1997. (CX-16, pp. 7-8).

On October 14, 1997, Claimant returned to Dr. Perry still complaining of pain. His neurologic exam was stable. Dr. Perry again recommended that Claimant be examined by Dr. Raggio. (CX-16, p. 10). On October 29, 1997, Claimant continued to complain of pain in his back and numbness along his belt line and pain down his right leg. He had seen Dr. Raggio who recommended a myelogram/CT scan about which Dr. Perry agreed. Claimant was provided prescriptions for Duract and Elavil. (CX-16, p. 11).

On November 11, 1997, a CT scan of the dorsal/thoracic spine revealed an extradural mass at the C6-7. (EX-7). On November 11, 1997, a dorsal myelogram was conducted which did not reveal any definite intradural nor extradural mass at L2-3. (EX-8).

On November 18, 1997, Claimant reported he is "trying to decide whether or not to have surgery" recommended by Dr. Raggio. His neurologic exam was stable. Dr. Perry opined that if Dr. Raggio "feels that [surgery is] appropriate he would agree." (CX-16, p. 12). Dr. Perry prescribed a TENS unit for Claimant on November 18, 1997. (CX-16, p. 13).

On December 16, 1997, Claimant returned to Dr. Perry with a chief complaint of back pain. Dr. Perry noted Claimant had "what appears to be a thoracic disc herniation." Claimant's neurologic exam remained stable. Dr. Perry recommended that Claimant return to Dr. Raggio for surgical treatment. (CX-16, p. 14).

Dr. John F. Raggio

On December 12, 1997, Dr. Raggio prepared a report addressed to Carrier. (CX-15). On October 29, 1997, Dr. Raggio, a board-certified neurosurgeon, examined Claimant based on a referral from Dr. Perry. Claimant informed Dr. Raggio of a pop in the middle of his back while "putting in a 300 pound pin" on August 11, 1997. He was unable to work because of a burning-type pain in the thoracic area. Claimant also described pain down the back of his right leg and the use of a TENS unit.

On physical examination, Claimant's neurologic exam was completely normal. Dr. Raggio noted a disc abnormality at T6-7 and T8-9 on MRI scan. He recommended a thoracic myelography and CT scan which was conducted on November 11, 1997, revealing an extradural mass at T6-7 on the left consistent with a herniated

disc. (CX-15, pp. 2-3). Dr. Raggio opined that thoracic discectomy was the best way to relieve Claimant's symptoms if he was unable to live with them. He noted that since Claimant had no neurologic deficit, "this is a pure pain problem and surgery would be for his comfort, however, he has had all manner of conservative treatment and I see no further options for him that I could recommend other than surgery." (CX-15, p. 1).

On February 27, 1998, Dr. Raggio corresponded with Carrier indicating he received a letter from Dr. Larkins who concluded that no surgery or further work-up was indicated for Claimant. He reported Claimant continued to complain of severe pain and was requesting narcotic medications. He recommended that (1) an appointment be made with a physiatrist for pain control with either Dr. Frank Lopez or Dr. Paul Mayes and (2) a third opinion from a neurosurgeon be obtained. (CX-15, p. 10).

On March 3, 1998, Dr. Raggio again recommended a third opinion from a neurosurgeon and an evaluation by Dr. Paul Mayes for pain control. (CX-15, p. 11).

Dr. Alvin W. Larkins

Dr. Larkins, a board-certified orthopedist, conducted a second opinion evaluation on February 12, 1998, regarding thoracic surgery on Claimant at the behest of Carrier. (EX-9; EX-70). He noted that Claimant described his injury while lifting a roller pin weighing 300 to 400 pounds and a "pop" in his upper mid-back. Claimant reported a burning and pulling pain which increased with activity such as physical therapy, walking, sitting and standing. Claimant rated his pain as a 6 of 10 and constant in nature. (EX-9, p. 1).

On physical examination, Dr. Larkins noted no scoliosis, list or spasm; straight leg raising was normal; and there were no motor or sensory deficits in either lower extremity. (EX-9, p. 2). He opined that the X-rays of the thoracic spine showed no gross abnormality, but the myelogram/CT scan of November 11, 1997, revealed impingement on the thecal sac on the left side at T-8. X-rays of the lumbar spine of November 11, 1997, demonstrated a Grade I spondylolisthesis at L5-S1 and palpable spondylolysis at L5. He diagnosed thoracolumbar strain. (EX-9, p. 3).

Dr. Larkins opined that "the operation recommended is not indicated in this patient" since Claimant "has no long track signs and no myelopathy." He stated the "yield with this procedure is not high and the risks are very significant." He commented that he had reviewed a 1986 evaluation "where there was concern about

changes at D8." He reported Claimant may benefit from selective nerve root blocks done through a pain management service and, if successful, "ablating the nerve root would be less of a procedure than thoracic diskectomy." Lastly, he opined Claimant had evidence of spondylolysis at L5 and spondylolisthesis at L5-S1 which may be the cause of his radicular symptoms in his leg. (EX-9, p. 3). He concluded that since Claimant's lower lumbar spine was not his major complaint, Claimant required no work-up or treatment now. (EX-9, p. 4).

On June 27, 1998, Dr. Larkins responded to Carrier's inquiry about "concern about changes at D8" that he characterized as "typographical errors" in his assessment which he corrected to read "concern about complaints at D8." (EX-10; CX-14, p. 5).

Dr. Ian F. Angel

Dr. Angel, a board-certified neurosurgeon, conducted an evaluation of Claimant on July 1, 1998, at the request of Carrier. (EX-17; EX-67). Claimant complained of mid-thoracic back pain and tightness in his chest, but with no radiation of the pain and no band-like pain. Claimant informed Dr. Angel that he heard a pop in his back while lifting a 300-pound pin. Dr. Angel commented that Claimant had seen Dr. Grover, a pain management specialist, who performed paraspinal muscle injections, but with no real relief. He noted Dr. Raggio planned a surgery to which Dr. Larkins did not concur. (EX-17, p. 1).

Dr. Angel reviewed Dr. Rafes's report of July 28, 1986, concerning treatment for a thoracic back injury suffered on May 27, 1985. Claimant reported that he gradually improved and went back to work. Dr. Angel observed that in 1986 Claimant's pain was in a similar region of his spine in the T7-8 area of the thoracic spine. (EX-17, p. 2).

The neurological examination revealed no sensory loss in the T6 and T7 dermatomes, bilateral tenderness around the T6-7 region, no spasm in the lumbar area and negative straight leg raising. Dr. Angel reviewed the MRI report of September 24, 1997 which showed a herniated disc at T6-T7. Plain myelogram films of the thoracic spine dated November 11, 1997, showed no fracture, subluxation, stenosis or any type of defect. The CT scan post-myelogram of November 11, 1997, revealed a central disc bulge at the T6-7 interspace toward the left. Dr. Angel opined that the foramen was not compromised.

His impression was thoracic musculoskeletal pain. His recommendations included no neurological intervention since

Claimant does not have an operable lesion. He observed that if Claimant had an impingement at the T6-7 region, he would have radicular pain radiating around his chest, which he did not report to Dr. Angel. He concurred with Dr. Larkins that surgery would not benefit Claimant. He opined that a trial of epidural steroids may be considered, but they may not give Claimant any relief. He opined Claimant had reached maximum medical improvement since it had been one year since his injury and he had failed all conservative modalities. Lastly, he concluded Claimant was employable with the only limiting factor his pain. He stated it would be of benefit to obtain a functional capacity evaluation to determine the extent of Claimant's job capacity. (EX-17, pp. 2-3).

On May 20, 1999, Dr. Angel responded to Carrier's request for a reevaluation of Claimant. He affirmed he did not have anything to offer Claimant. He suggested that if Dr. Clifton, who is "a very capable neurosurgeon" recommends a thoracic MRI, Carrier should address issues of necessity for the MRI with him since he must feel it is indicated. He reaffirmed Claimant was at maximum medical improvement when he corresponded with Carrier on July 1, 1998. (EX-16, p. 11).

Dr. Pawan Grover

The parties deposed Dr. Grover on December 11, 2002. (CX-3). He is board-certified in anesthesiology by the American Association of Anesthesiologists and board-certified by the American Academy of Pain Management and the American Board of Pain Medicine. (CX-3, p. 4). He specializes in chronic pain management. (CX-3, p. 3). He is the Medical Director of interventional pain management for The Pain Care Center. (CX-3, p. 70).

On June 4, 1998, Dr. Grover examined Claimant based on a referral from Dr. Raggio. Claimant's chief complaint was back pain, describing a burning-type of pain on both sides of his mid-back radiating around to the ribs. He reported a constant pain which was aggravated by any sort of activity. Claimant also described a burning pain in his neck. (CX-3, p. 6; EX-22). He reported onset of pain in August 1997 when he hurt his back lifting a 400-pound steel roller pin at work. (CX-3, p. 7; CX-5, p. 2).

On physical examination, Dr. Grover found marked tenderness in the facet joints along the spine, particularly from his mid-back to the upper lumbar area. He also found multiple trigger points (little spasms or knot areas) in the muscles in that area, which suggested the muscles as a source of pain. (CX-3, p. 8; CX-5, p. 2).

On June 12, 1998, Dr. Grover performed a thoracic facet injection with novocaine as a temporary numbing agent for diagnostic purposes. (CX-3, p. 11; CX-5, p. 9). The injection was positive because Claimant attain complete relief the day of the procedure, significant relief for two or three days after, but then returned to the same level. As a result of the injection, Dr. Grover opined that Claimant had thoracic facet syndrome. (CX-3, p. 12). His working diagnosis was facet syndrome, thoracic radiculopathy and degenerative disc disease which could be caused by Claimant's mechanism of injury. (CX-3, p. 13).

Claimant was placed in physical therapy, with repeat injections and medications to break the cycle of pain. (EX-22, pp. 6, 8). Radiofrequency lesioning was considered as a long-term nerve block of the facet nerve. (CX-5, pp. 29-30). The radiofrequency lesioning treatment was considered around August 7, 1998, but was denied by the insurance carrier. (EX-22, p. 10). After an appeal to the carrier (EX-23, p. 32), the radiofrequency was performed on September 29, 1998, which provided pain improvement since it was no longer constant. (EX-22, pp. 11-12; CX-5, p. 34). Claimant was provided a muscle stimulator to use at home with additional physical therapy. (CX-3, p. 15; EX-23, p. 56). In November 1998, Dr. Grover considered a repeat radiofrequency and adjusted Claimant's medications. (EX-22, p. 14). In December 1998, Claimant was referred to Dr. Guy Clifton, a neurosurgeon, for re-evaluation. (EX-22, p. 15; CX-5, p. 41).

On December 24, 1998, Dr. Grover completed a Form OWCP-5 which restricted Claimant to intermittent sitting, walking, lifting, bending, squatting, climbing, kneeling, twisting and standing, but for zero hours in a day because such activity causes him pain. (CX-3, pp. 17-18, exhibit 2; CX-5, p. 42). Dr. Grover noted that Claimant was unable to work and had not reached maximum medical improvement. (CX-3, p. 19). Claimant continued treating with Dr. Grover through 1999 and 2000 on medication and physical therapy. (CX-5, pp. 43-68).) On July 6, 2000, Dr. Grover opined that he had exhausted all conservative treatment for Claimant and had nothing further to offer and Claimant should pursue surgical evaluation again. (EX-22, p. 32). Dr. Grover referred Claimant to The Center For Work Rehabilitation for a functional capacity evaluation conducted on June 12 and 13, 2000. (CX-3, p. 20).

Dr. Grover testified that Claimant's condition has remained fairly constant over the period of his treatment and Claimant's prognosis is poor. (CX-3, p. 24). He considers Claimant's condition to be permanent in view of his chronic pain syndrome. He opined, based on reasonable medical probability, that Claimant's chronic pain is related to his on-the-job injury of August 11,

1997. (CX-3, p. 25). Claimant continued under the same regimen through 2001, until August 21, 2001, when he received another facet injection. (CX-5, pp. 69-77). Radiofrequency of the facet joints was again conducted on September 25, 2001. (CX-5, p. 81).

On June 12 and 13, 2000, The Pain Care Center conducted a functional capacity evaluation of Claimant. (EX-23, pp. 202-210). It was determined that Claimant demonstrated an ability to work at the sedentary physical demand level. Limiting factors reported by Claimant included "upper back pain and weakness." (EX-23, p. 204). It was concluded that Claimant exhibited consistent maximum voluntary effort during the evaluation. Claimant demonstrated physical tolerances for sitting continuously for 15 minutes, being on his feet for 90 minutes, standing in one place for five minutes and an inability to stoop. (EX-23, p. 206). Claimant reported increased pain levels during the evaluation. The therapist concluded that Claimant's endurance for performing upper extremity activities was low and that he would need limited hours and frequent breaks to perform any type of gainful employment that utilizes his arms on a consistent basis. It was also determined that Claimant could not perform the physical requirements of his former job. (EX-23, p. 210).

On December 5, 2002, Dr. Grover examined Claimant and detected muscle spasm for which Flexeril was prescribed. (CX-3, p. 26). Claimant was then taking "a normal dose" of Norco, a low-level narcotic. (CX-3, p. 27). He opined that side effects of narcotic medications are "individually dependent" and Claimant did not describe "any sort of affecting." (CX-3, p. 28).

Dr. Grover explained that a drug-seeking behavior involves a person who is "usually getting medications from different pharmacies, from different doctors, using the medication early–more than prescribed and running out early." (CX-3, p. 29). He did not have any of those experiences with Claimant over the period of his treatment. Dr. Grover testified he has seen Dr. Perez's report expressing concern over Claimant's possible drug-seeking behavior and wanted a second opinion regarding his statement. He stated he had seen other, similar reports from Dr. Perez. (CX-3, p. 30). Additionally, Dr. Fillmore felt Claimant should be weaned off his narcotic medications. Dr. Grover referred Claimant to Dr. Degner, a detox specialist, for evaluation. Dr. Degner opined that Claimant was not addicted to or abusing his medication and it was not appropriate to detoxify him from his medications. (CX-3, pp. 31-32). Claimant was quickly weaned off Oxycontin, a heavy duty narcotic, which was another indication that he was not abusing medications. (CX-3, p. 32).

Dr. Grover testified that the National Board and Texas Board for medical practice widely accept narcotics as a reasonable and necessary treatment for chronic pain. (CX-3, p. 33). The general consensus among medical societies and boards is that it is appropriate to use narcotics on a long-term basis. Dr. Grover stated that any person who has pain for a long time develops reactive depression from the chronic pain situation and narcotics improve the patient's quality of life. (CX-3, p. 34).

Dr. Grover confirmed that he had tried other conservative approaches with Claimant from physical therapy and rehabilitation to a pain program, a "whole multi-disciplinary approach in an intense program." Claimant has had neurological evaluations from Dr. Clifton, several secondary opinions about whether Claimant needs surgery, different medications, but has not been allowed to do further radiofrequency lesioning by the insurance carrier as "not medically necessary." (CX-3, pp. 35-36). In the absence of a neurological option, the only option left in Dr. Grover's speciality is radiofrequency lesioning. He opined it was necessary for Claimant to continue treating with Dr. Hernandez. (CX-3, p. 36).

Dr. Grover explained that radiofrequency lesioning is a mode of pain management. By using a needle, Dr. Grover cauterizes the pain nerve to the joint, getting rid of the pain nerve supply to the joint in an effort to effect a long-term nerve block which can last a couple of years. If successful, the patient can start working on the muscles and become more active. He opined that Claimant cannot engage in regular physical activity to build his muscles while he continues to have chronic pain. (CX-3, pp. 37-38). Dr. Grover stated that Claimant has had pain for so long that there are "probably" multiple sources of pain, to include muscular components, a radiculopathy component and facet joint problems. (CX-3, pp. 38-39).

Regarding restrictions for Claimant, Dr. Grover referred to the functional capacity evaluation of July 15, 2002 which restrictions he considered to be permanent. (CX-3, pp. 39, 45). He further opined that reactive depression and anxiety syndrome normally accompany pain in most patients which Dr. Hernandez is helping manage. (CX-3, p. 40). The medication therapy continued to control Claimant's pain. (CX-5, p. 103). He opined, based on the restrictions placed on Claimant by the functional capacity evaluation in July 2002, that Claimant is not capable of returning to his former job as an outside machinist. (CX-3, pp. 40-41).

Claimant was evaluated during the pain program for malingering and symptom magnification, but exhibited no signs of such

activity. (CX-3, p. 44). He has never released Claimant to return to any type of work. (CX-3, p. 49).

Dr. Grover expressed no disagreements with Dr. Fillmore's opinions, including narcotic drug use. (CX-3, p. 47).

He opined that the Carrier's denial of radiofrequency lesioning has affected his efforts to treat Claimant. Claimant had some success in the past with the procedure, which made it reasonable to do further treatments. Dr. Grover could not state that radiofrequency lesioning will cure Claimant's pain, but it was a non-surgical procedure that could be tried. (CX-3, p. 48).

On cross-examination, Dr. Grover reviewed Claimant's medications chronologically. Claimant was initially placed on Lortab but changed to Oxycontin on July 31, 1998. (CX-3, pp. 51-52). Claimant's dosage of Oxycontin was gradually increased in November to December 1998 because he indicated he needed a heavier dose of pain medication. (CX-3, p. 53; EX-22, p. 23). Claimant continued on Lortab, Flexeril and Oxycontin in December 1998. (CX-3, p. 54; EX-22, p. 24). Claimant continued on the same medications for 1999 and was weaned off Oxycontin in February 2000. However, on March 23, 2000, while in rehabilitation with Dr. Fillmore, Claimant's back pain increased and he was "placed back on some Oxycontin to get him through the rehab." (CX-3, p. 55). Claimant's last prescription for Oxycontin was May 30, 2002. Claimant was taking Oxycontin from June 1998 through May 2002, except for the period from January to March 23, 2000. (CX-3, p. 57).

Dr. Grover confirmed that he did not note any past medication history for Claimant at his initial office visit. (CX-3, p. 63; EX-22, pp. 1-2). Although he inquired about Claimant's past psychiatric or psychological treatment or counseling, Claimant did not report any treatment. (CX-3, pp. 63-64). Dr. Grover affirmed that Claimant reported no history of alcohol abuse, substance abuse or smoking, which is important in evaluating Claimant's addictive prognosis. (CX-3, pp. 65-66; EX-23, p. 4). Dr. Grover would have also wanted to know of Claimant's prior injuries where subjective complaints of pain were out of proportion to his objective physical findings. (CX-3, p. 66). Dr. Grover did not become aware during his treatment that "others" thought Claimant was abusing alcohol. (CX-3, p. 69).

Dr. Grover emphasized that Claimant signed a medication contract at The Pain Care Center which outlines what a patient can and cannot do on medications. A patient is not to drink alcohol or smoke marijuana. (CX-3, pp. 75, 77). He acknowledged he was

unaware of a report by Psychologist Ann Tripp on May 17, 2000, that indicated Claimant had a history of alcohol abuse. (CX-3, pp. 77-78, exhibit 6; EX-23, p. 96). He explained that Claimant had reported drinking in high school, quitting drinking two years ago, but recently drinking beer intermittently and occasionally. (CX-3, pp. 78-79). He questioned the basis of Psychologist Tripp's report since she did not indicate in Claimant's chemical dependency history that he had any sort of dependency on alcohol and noted the contradiction in her report. (CX-3, pp. 79-80). He affirmed that Claimant was not to be drinking alcohol at all while taking medications. (CX-3, p. 80).

Dr. Grover testified he was not aware that Claimant had characterized himself as a recovering addict before his first visit on June 4, 1998, or that his wife was also described as a recovering addict. (CX-3, p. 85). Dr. Grover would have wanted to know if Claimant was a recovering addict because he would have been a high risk for further substance abuse for medications. (CX-3, pp. 85-86). Claimant did not reported to Dr. Grover that he had been terminated from employment for violating an employer's alcohol and drug policy, which would have been of interest because it points to a history of substance abuse. (CX-3, p. 86). Dr. Grover was not aware that during his treatment Claimant was smoking marijuana, which also is a sign of substance abuse. (CX-3, p. 87, exhibit. 9). He was not aware that Claimant tested positive of marijuana in a drug screening conducted by The Pain Care Center on May 15, 2000. (CX-3, pp. 87-88, exhibit 8; EX-23, p. 80). He testified he had no suspicion during the four and one-half years he treated Claimant that he was smoking marijuana. (CX-3, p. 90).

Claimant never gave a history of having attended Alcoholics Anonymous or Narcotics Anonymous meetings. (CX-3, p. 90). Dr. Grover would have liked to have known about the meetings because it goes to the question of Claimant's potential for substance abuse and being high risk for abuse of medications. (CX-3, p. 91). Claimant never reported having seen a psychiatrist at the Mental Health Clinic in Orange, Texas in 1995 for a problem with anger or attending marital counseling sessions. (CX-3, pp. 96-97, exhibit 10; EX-23, p. 124).

Dr. Grover testified that during the four and one-half years of treatment Claimant never stated he wanted to return to work. One of Dr. Grover's and The Pain Care Center's goals was to return Claimant to work. (CX-3, pp. 101-102). While taking medications, Claimant was restricted from driving as instructed in the medication contract. (CX-3, pp. 103-104).

Dr. Grover confirmed that Claimant had two radiofrequency lesionings on both sides, beginning on September 29, 1998 and the second on September 25, 2001. (CX-3, pp. 105-106; EX-22, p. 47). He testified that ten percent of the radiofrequency lesioning requests are denied by insurance companies. (CX-3, p. 106). Dr. Grover acknowledged that after exhausting conservative treatment through July 6, 2000, Claimant's general overall condition was not any better than it was on June 4, 1998, when his treatment began. (CX-3, pp. 107-108). Dr. Grover then opined that Claimant should pursue surgical evaluation again. (CX-3, p. 107; EX-22, p. 32).

Dr. Grover testified there is no indication that Claimant abused the medications prescribed to him even if he had a substance abuse problem. Dr. Grover never observed any signs of Claimant's drug-seeking behavior during his treatment. (CX-3, p. 111). Dr. Grover observed no indication that Claimant was seeking medications from other doctors or other pharmacies. (CX-3, p. 112). He was aware that Carrier was not paying for Claimant's medical treatment, but was not aware of the reasons for not paying. If Claimant's failure to go to detoxification was the reason, Dr. Grover stated he sent Claimant to the facility recommended by Dr. Fillmore, which concluded Claimant did not require detoxification. (CX-3, pp. 112-113; EX-22, pp. 58, 61).

Dr. Carlos Hernandez

On January 15, 2003, Dr. Hernandez was deposed by the parties. (CX-6). Dr. Hernandez is a general psychiatrist licensed to practice in the State of Texas for the last six years. He is not board-certified, nor does he hold any specializations in Psychiatry. (CX-6, pp. 6-7).

On May 15, 2000, Dr. Grover and The Pain Care Center referred Claimant for a psychiatric evaluation on the same date. (CX-7, p. 215). Dr. Hernandez reported that he was not given any specific instructions prior to the patient referral.[2] (CX-6, pp. 8, 28). Dr. Hernandez acknowledged that his treatment of Claimant did not include the management of pain medications. (CX-6, p. 14). Initially, Dr. Hernandez diagnosed Claimant with Depressive Disorder, Not Otherwise Specified and Impulse Control Disorder.

[2] In his deposition, Dr. Hernandez reported that he did not receive any special instruction from Dr. Grover, the referring physician, regarding possible treatment issues for Claimant. (CX-6; pp. 8, 28). However, he later acknowledged that he received a telephone call from Dr. Grover's case manager advising of Claimant's marijuana use. (CX-6, p. 36).

(CX-6, p. 9; CX-7, p. 186). He later added a diagnosis of Anxiety Disorder, Not Otherwise Specified. (CX-6, p. 25). Dr. Hernandez did not find any evidence to support a diagnosis of malingering. (CX-6, p. 25). Dr. Hernandez noted Claimant reported feelings of depression (hopelessness/helplessness), anxiety, mood swings, irritability, shortened temper, crying spells, weight loss and insomnia. (CX-6, pp. 8-9; CX-7, pp. 185-186).

Dr. Hernandez further testified that secondary to his chronic pain and inability to work, Claimant experienced a number of stressors, such as marital problems, behavioral problems with his daughter, and academic problems with his son. (CX-6, pp. 13, 53-54; CX-7, pp. 82-83). He testified that Claimant's chronic pain was related to his August 11, 1997 back injury at work. (CX-6, p. 14). Thus, Dr. Hernandez concluded that the chronic pain, associated with the "chronicity" of these stressors, attributed to Claimant's continuing depression and suicidal ideation. (CX-6, pp. 15-16).

Claimant was engaged in on-going psychiatric treatment with Dr. Hernandez for medication management of the aforementioned symptoms and stressors from May 15, 2000 until December 19, 2002. (CX-6, pp. 7, 20-21). During the course of treatment, Dr. Hernandez prescribed Claimant a broad spectrum of psychotropic medications to manage his psychiatric symptoms, which included Neurontin, Celexa, Trazodone, Zyprexa, Depakote, and Seroquel. (CX-6, pp. 10-19). He opined that Claimant's need for psychotropic medications is caused, in part, by his 1997 job injury. (CX-6, p. 22). Without such medication, Dr. Hernandez opined Claimant's condition will decompensate and he will be more dysfunctional.[3] (CX-6, p. 23). When indicated, Dr. Hernandez also included Claimant's wife or father during the course of treatment. (CX-6, p. 16).

Claimant's last visit with Dr. Hernandez was on December 19, 2002. (CX-6, p. 21). Claimant advised Dr. Hernandez he would seek treatment at the local Mental Health Clinic, because of the

[3] Although Dr. Hernandez did not manage pain medications for Claimant, the record includes numerous requests from the referring physician's office (Dr. Grover) regarding a recommendation of continuing with narcotic medications. (CX-7; pp. 59, 73, 87, 91, 92). Again, the record is silent regarding Dr. Hernandez's responses or recommendations towards these requests. Dr. Hernandez stated that he may have sent Dr. Grover a copy of his handwritten progress notes as his answer to Dr. Grover's requests. (CX-6, pp. 30-31).

cost of the medications and decreased health insurance benefits. (CX-6, pp. 21-22).

Dr. Hernandez opined that individuals who are severely depressed are not able to tolerate the stress of work during the acute phase of the depression, but, if stable on medication, most are able to "keep the job." (CX-6, p. 23). If Claimant is unable to take his prescribed medications, he cannot function in a work environment without significant problems. (CX-6, pp. 23-24). On further examination by counsel for Employer/Carrier, Dr. Hernandez testified that Claimant reported he had attended counseling for anger and anxiety at the Mental Health Clinic in Orange County, which was "probably after" his August 11, 1997 job injury. (CX-6, p. 34).

Dr. Hernandez estimated that since this is the Claimant's second episode of depression, he would require approximately five years of psychiatric treatment, with the possibility of continuous medication management of his mood disorder "forever." (CX-6, pp. 60-61). He could not assume that counseling for anger was related to chronic pain. (CX-6, p. 35). Dr. Hernandez testified that Claimant related he had used marijuana, but stopped its use three years before his May 15, 2000 appointment. (CX-6, p. 36). Dr. Hernandez acknowledged that Claimant tested positive for marijuana use on May 15, 2000.[4] (CX-6, p. 37, exhibit 4). Dr. Hernandez inexplicably recanted his earlier testimony about Claimant stopping marijuana use three years before and changed his testimony to "use of marijuana 2 to 3 times a year." (CX-6, pp. 38-39). Dr. Hernandez acknowledged that on May 15, 2000, he also diagnosed Claimant with Impulse Control Disorder, Not Otherwise Specified, but without any history connecting the disorder to chronic pain. (CX-6; pp. 42-43). Dr. Hernandez never restricted Claimant from returning to work. (CX-6, p. 56). He opined that during the course of his treatment Claimant became more stable, slept better and his anger and mood were better. (CX-6, p. 58). Dr. Hernandez

[4] Further, Dr. Hernandez did not address Claimant's marijuana use during counseling even though he was apprised of the positive drug screen from the referring physician on the date of the initial appointment, nor did he institute any drug testing to screen for concurrent marijuana abuse. (CX-6, pp. 36-40). In fact, the medical record is essentially silent of documentation regarding substance abuse except noting that, "patient is not abusing his po meds" and "does not recommend detox." (CX-6, pp. 20-21, 38; CX-7, p. 57). Contrary to Dr. Grover's opinion, Dr. Hernandez stated in his deposition that, "I believe that it's not a big problem for him to use marijuana on a daily basis." (CX-6, p. 39).

testified that Claimant's depression would not prevent him from working. (CX-6, p. 62).

Dr. Guy L. Clifton

Dr. Clifton examined Claimant on April 21, 1999, based on a referral from Dr. Grover. (EX-13). Dr. Clifton's history from Claimant describes his job accident of August 11, 1997, and notes a persistence of symptoms since with no improvement despite being seen by a number of physicians. (EX-13, p. 1).

Claimant reported a boring pain in the mid-thoracic spine which radiates to the left and to the sternum. He also complained of pain and numbness in his right leg. On physical examination, Claimant had some increased buttock pain with straight leg raising on the right and point tenderness at about the T6-7 level. His strength, sensation and reflexes were all normal in the upper and lower extremities. Dr. Clifton reviewed Claimant's 1997 myelogram from which he identified a disc extrusion at T6-7 on the left that abuts the T7 pedicle and is distorting the spinal cord. Dr. Clifton opined that Claimant had symptoms consistent with myelopathy of the left leg and radicular symptoms on the left due to the thoracic disc herniation and recommended surgical decompression of the area. (EX-13, p. 1).

He noted that before any surgery is done, Claimant would need a thoracic and lumbar MRI scan because Claimant has a component of radicular pain. (EX-13, p. 2).

On June 30, 1999, Dr. Clifton reviewed Claimant's May 24, 1999 MRI of the lumbar spine. (EX-1). He noted approval for a thoracic MRI was denied. He interpreted the lumbar MRI as showing severe foraminal stenosis at L5-S1 bilaterally and anterolisthesis at L4 and L5. Noting that Claimant had two distinct components of pain: radicular pain in the right leg; and midline thoracic pain radiating bilaterally, more to the left than the right. He recommended a costo-transversectomy and disc resection of the T6-7 disc, alternately a thoracotomy with disc resection, and a foraminotomy at L5-S1 on the right. (EX-14).

On November 8, 2000, Claimant returned to Dr. Clifton. He had another thoracic MRI scan on December 7, 1999. (EX-2). Claimant reported the same symptomology. After reviewing the later MRI scans, Dr. Clifton reported that he did not "see a significant disc herniation in the thoracic spine at T6-7 or any other level." The lumbar spine showed no significant foraminal narrowing at any level. He concluded that surgery "really is not needed and is not indicated in this patient." He expressed doubt that Claimant would ever return to work as a machinist. He did not think Claimant

could currently go back to sedentary work because of extremely limited range of motion in the cervical, thoracic and lumbar spine. He recommended extensive physical therapy. (EX-15).

Dr. Eugene A. Degner

Dr. Degner examined Claimant on August 12 and 27, 2002, for possible opiate detoxification. He spoke with Claimant and his wife, Dr. Grover and Dr. Hernandez and reviewed the reports of Drs. Fillmore and Perez. It was confirmed that Claimant has been completely weaned off Oxycontin and is maintained on 180 Lortab a month.

He opined that based on the information provided, it would be impossible to make a case of opiate abuse. Claimant appeared to take his medications as prescribed for his chronic pain. Dr. Degner discussed detoxification with Claimant as a voluntary option which Claimant rejected. Claimant reported he believed only surgery would stop his pain. Claimant was offered detoxification for Hydrocodone which he was unwilling to pursue. (CX-9).

Dr. Robert Levinthal

On July 6, 1999, Dr. Levinthal reviewed Claimant's lumbar spine MRI of May 27, 1999, from which he concluded there was no obvious evidence of significant focal disc herniation or nerve compression. He also reviewed a limited myelogram and CT scan of the thoracic area which revealed no significant disc herniation, a small lesion at T6-7 on the left side, but no evidence of focal nerve compression. He observed no evidence of cord compromise. (CX-11, pp. 1-2).

On November 9, 1999, Dr. Levinthal conducted an independent medical examination of Claimant at the behest of the U. S. Department of Labor. (CX-11, pp. 3-4). Claimant presented with complaints of mid and low back pain, radiation around his upper chest area. (CX-11, p. 3). Claimant reported he does not smoke or drink alcohol. On examination, Dr. Levinthal could find nothing that suggested a thoracic cord compressive lesion. He recommended a good quality MRI of the thoracic spine focusing on the T6 through T8 be obtained before he could make a permanent and final recommendation. He concluded that Claimant had no significant surgical lesion in his low back. His diagnosis was "rule out a T6-7 disc" which if present would be related to Claimant's job injury. He further opined that Claimant had not reached maximum medical improvement. (CX-11, p. 4).

On November 9, 1999, Dr. Levinthal reviewed a 1997 thoracic MRI which he interpreted as revealing a minimal disc at T6-7 which is not causing focal nerve compression. He also noted no disc compression at T7-8. He recommended that the study be repeated to obtain a good quality study. (CX-11, pp. 5-6).

On February 1, 2000, Dr. Levinthal reviewed the thoracic spine MRI performed at his request on December 7, 1999. (EX-2). He noted a small defect at T6-7 and T8-9. However, neither defect was touching the cord or causing focal nerve compression. He also noted a small defect at T5-6 with no focal compression. He concluded that the study was "fairly benign." (CX-11, p. 7).

On February 1, 2000, Dr. Levinthal again examined Claimant. His complaints were the same. He recommended that Claimant be sent for range of motion studies of his thoracic spine and thereafter a maximum medical improvement date and impairment rating be assigned pursuant to the AMA Guides. (CX-11, pp. 9-10).

On November 4, 2002, Dr. Levinthal responded to inquiries propounded by Counsel for Employer/Carrier. He opined that he was uncertain about defining an injury for Claimant. He may have sustained a soft tissue injury. (CX-11, p. 11). He stated Claimant could perform sedentary office work when he saw him in February 2000 and "had probably reached his maximum medical improvement." Claimant's complaints of pain precluded him from doing activity that required lifting greater than 20 pounds or prolonged bending, standing or stooping. He opined Claimant's restrictions are permanent. The degree of pain complaints voiced by Claimant would preclude his return to outside machinist's work. However, there was nothing from a neurologic standpoint or an objective evaluation standpoint that would limit Claimant in his activities. He also suggested that it would be helpful to wean Claimant from any significant level of narcotic medication which he still requires. Dr. Levinthal opined that he did not feel Claimant needs further treatment from Dr. Grover, but the injuries he sustained on August 11, 1997 are the reasons he was required to treat with Dr. Grover. (CX-11, p. 12).

Dr. Scott Fillmore

On December 12, 2002, Dr. Fillmore was deposed by the parties. (EX-52). Dr. Fillmore has been board-certified in physical medicine and rehabilitation since 1991. He has also held diplomate status with the American Board of Independent Medical Examiners for approximately three years. (EX-52, p. 6; EX-51, p. 2).

Dr. Fillmore performed office examinations and reviewed medical records of Claimant on May 17, 2000 and April 4, 2002. (EX-

56; EX-57). In his May 17, 2000 report, he took a history from Claimant of his work accident and performed a physical examination. He reported a normal neurologic examination and declined to recommend surgery. He diagnosed Claimant with dorsalgia secondary to thoracic spine dysfunction. He acknowledged detecting spasm, an objective finding. (EX-52, p. 63). His treatment recommendations for Claimant included a review of spinal imaging studies, weaning off narcotic medications of Lortab and Oxycontin, which are addictive and can cause worsening of depression symptoms, and completion of a chronic pain management program. (EX-52, pp. 16-19; EX-56, p. 2).

Dr. Fillmore maintained his previous diagnosis of Claimant on his subsequent April 4, 2002 evaluation. Additionally, he noted multi-level thoracic and lumbar spondylosis (arthritis), mild anterolisthesis at L-5 relative to S-1, dorsal spine pain with T7-T8 and T8-9 disc bulge and a normal, intact neurologic examination, chronic mid-dorsal spine pain, opiate dependence, depression and insomnia related to a chronic pain state, and status-post multiple work-related injuries, such as a thoracic spine injury in 1985 or 1986 and a right knee injury in 1996.

Dr. Fillmore's treatment recommendations included continuance of psychiatric care with Dr. Hernandez (which was considered reasonable and necessary), "maintenance care" with his primary physician Dr. Grover, and discontinuance of narcotic medications. Further, he stated that "invasive anesthesia procedures" were counter-indicated for Claimant, including radio-frequency lesioning. (EX-52; pp. 31-33). Dr. Fillmore opined that Claimant reached maximum medical improvement on February 1, 2000. (EX-52, pp. 24-26; EX-57, p. 4). Dr. Fillmore concluded that Claimant could return to full-time work with a restriction of no pushing, pulling or lifting greater than 15 pounds as of February 2000. (EX-52, pp. 29, 31, 66; EX-57, pp. 5-7).

In a report dated June 18, 2000, Dr. Fillmore responded to additional inquiries of Counsel for Employer/Carrier. (EX-58). He opined Claimant's pain "has gotten into a chronic state" and Dr. Grover should provide maintenance care follow-up two to three times a year for medication management. He reaffirmed Claimant's restrictions of 15 pounds for pushing, pulling and lifting which were secondary to his August 11, 1997 job injury. Although he expressed a belief that Claimant should be able to return to full duty without restrictions at some point in the future, he could not project when, since such a return is dependent upon his medication usage. (EX-58, p. 2).

In his deposition, Dr. Fillmore stated that, based on the June 12, 2000 functional capacity evaluation, as well as his examination

of Claimant, there were "very minimal" objective findings to support Claimant's subjective reports of chronic pain. (EX-52, pp. 21-24, 42; EX-57, p. 2). Further, he stated that Claimant appeared to be magnifying his symptoms. (EX-52, p. 23). Dr. Fillmore opined that Claimant has the ability to "make a full recovery" should he decide "to get more motivated, take more responsibility for his care." (EX-52, p. 42; EX-57, p. 5). However, he stated on examination of Claimant "you really can't find anything wrong with him, and when you look at the objective testing, you can't find anything wrong on the objective testing to make sense of why this patient hurts." (EX-52, p. 42). Moreover, Dr. Fillmore suggested that Claimant's length of treatment (4½ years) and lack of symptom improvement indicated that he may be motivated by factors of "secondary gain." (EX-52, pp. 42-43).

Dr. Fillmore explained the inconsistencies noted by the physical therapist in the July 15, 2002 functional capacity evaluation. Inconsistencies in dermatomal and/or peripheral nerve patterns made no sense to Dr. Fillmore since it was not correlated to known anatomical information. (EX-52, p. 38). The therapist also commented that despite pain scale reports of 8-9 on a 10 point scale, Claimant carried on normal conversation and his gait patterns, behavior and/or facial expression did not change through the evaluation indicating increased pain levels. (EX-52, p. 39). The therapist's observation that Claimant might be a "Type III Symptom Magnifier" is consistent with his examination of Claimant and his reaction to "real light superficial touch" to his back, which he interpreted as Claimant "faking" a response. (EX-52, pp. 40-41).

In Dr. Fillmore's April 4, 2002 evaluation, he reported that Claimant had been "treated conservatively with interventional pain management" techniques from Dr. Grover. (EX-57, p. 4). However, on cross-examination, Dr. Fillmore testified that he agreed with the diagnoses Dr. Grover assigned to Claimant, although he disagreed with the "invasive" treatment approaches that were undertaken. (EX-52, pp. 33, 49, 58, 68). He testified that chronic pain patients who do not respond to normal treatment are then followed up "mostly [with] medication management." (EX-52, p. 56). Additionally, Dr. Fillmore reported objective findings of bulges in the thoracic spine of Claimant, that he initially described as not "particularly uncommon," but which he later admitted could be consistent with reports of chronic pain. (EX-52, pp. 58-60). Further, Dr. Fillmore admitted that subjective complaints of pain should be included when conducting an evaluation of chronic pain. (EX-52, p. 54).

Initially, Dr. Fillmore indicated Claimant could return to full duty (40-hour work week) with a work restriction of no

pushing, pulling, or lifting greater than 15 pounds. (EX-57, p. 5; EX-58, p. 2). However, Dr. Fillmore's recommendation regarding Claimant's ability to return to work vacillated throughout his deposition. First, he qualified that Claimant should gradually integrate into the work setting over a period of 8-12 weeks, beginning at four hours per day, five days a week, since he had not worked for a number of years. (EX-52, pp. 71-72). Second, he noted that Claimant would not be able to return to work on his current medication regimen, thus the need to be weaned off medications. (EX-52, pp. 33-34, 74). He was unaware that Claimant had been weaned off Oxycontin and, if so, he agreed Claimant was not wholly dependent on its use. (EX-52, p. 69). Third, he indicated that the "inconsistencies" on Claimant's prior functional capacity evaluations, on which he based many of his recommendations, made it difficult for him to render a decision regarding whether Claimant could return to work, and if so, under what restrictions. (EX-52, pp. 81-82). He also changed his restrictions of Claimant to conform to the conclusions reached in the July 15, 2002 functional capacity evaluation. (EX-52, pp. 45-46). Finally, Dr. Fillmore concluded that Claimant could return to the heavy labor position that he held prior to his injury. (EX-52, p. 84).

It is important to note that the only conclusions consistently maintained by Dr. Fillmore throughout his evaluations and subsequent deposition were his recommendations that Claimant continue with Dr. Hernandez for psychiatric treatment, and discontinue narcotic medications. (EX-52, pp. 57, 77; EX-56, p. 2; EX-57, p. 5).

The Center For Work Rehabilitation (FCE)

On July 15, 2002, Claimant was referred by Dr. Grover to The Center For Work Rehabilitation for a functional capacity evaluation to determine his safe level of functioning, "day in and day out," within his pain tolerance. (CX-5, p. 93; EX-55). Initially, a litany of problem areas were listed. It is unclear if these problems were subjectively identified by Claimant or objectively determined by Dan Kershner, the physical therapist who prepared the report.

Certain inconsistencies noted during the evaluation were highlighted: a 60% variance between known and unknown weights lifted; sit and reach testing; variances in squatting during the evaluation; reports of decreased sensation in the upper and lower extremities were "spotty" and not consistent with dermatomal and/or peripheral nerve patterns; and, despite pain reports of 8-9 out of a 10 pain scale, Claimant inconsistently carried on normal

conversation, gait patterns, behavior and/or facial expressions. (EX-55, pp. 1-2).

It was determined that Claimant demonstrated an ability to lift an average of 22 pounds occasionally and ten pounds frequently, could carry 30 pounds, push 62 pounds of force and pull 50 pounds of force. His physical abilities demonstrated a capacity to perform light level work. The therapist noted that due to Claimant's multiple complaints and inconsistencies, it was difficult to determine an accurate work level.

The therapist concluded that, if Claimant's former work as an outside machinist required occasional lifting over 100 pounds and frequent lifting over 50 pounds, Claimant's performance did not meet such requirements. It was also concluded that Claimant "may be a Type III Symptom Magnifier, and may be unconsciously magnifying his pain complaints in an effort to control the environment." In clarification, the therapist commented that by so stating "does not mean [Claimant] is not experiencing genuine pain." (EX-55, p. 2). It was recommended that, since Claimant has had physical therapy, a pain management program, multiple injections and laser procedures, he should follow-up with his treating physician to review his assessment. Id.

The Surveillance Evidence

Employer/Carrier proffered two surveillance videos and photographs of Claimant. (EX-63; EX-64; EX-68). Claimant was taped on August 7, 1999 sitting on a riding lawnmower, talking to another individual and thereafter cutting grass. The video began at 9:03 a.m. and stops at 9:49 a.m. with intermittent breaks of non-taping throughout. At 5:30 p.m. Claimant is taped walking into his residence. Taping ended at 5:47 p.m. (EX-63). The photographs comprised in EX-68 appear to be the same depictions of Claimant cutting grass on a riding lawnmowwer as exhibited in the video of August 7, 1999.

On January 5, 2003, Claimant was taped at a service station filling his car at 11:41 a.m. At 12:32 p.m. Claimant and a woman are waiting for a bagboy to load their car trunk with grocery bags. At 12:44 p.m., Claimant is shown carrying what appear to be plastic grocery bags in each hand into his residence. He returns for several more grocery bags. The taping concludes at this point. (EX-64).

On January 6, 2003, an individual is taped sitting in a car, getting out, bending over into an open hood and working on the car. This individual was taped from 10:21 a.m. intermittently until 10:52 a.m. and does not appear to be the Claimant. At 10:52 a.m.,

Claimant arrives and walks into the residence. He returns to the car at 10:57 a.m., but does not bend over into the open hood rather stands with his arm bracing him on the fender. Periodically, from 11:04 a.m. to 11:12 a.m., Claimant bends over behind a car in the foreground, but his activity cannot be viewed on the video. At 11:13 a.m., Claimant is seen with both hands behind his lower back stretching. The tape ends at 11:20 a.m. on January 6, 2003, with Claimant sitting in the car being repaired. Before the conclusion of the video the date/time group depicts taping at 12:56 p.m. on January 7, 2003, which reveals nothing of interest.

I find and conclude that the surveillance videos and photos do not reveal any activity which is inconsistent with Claimant's testimony, physical restrictions or the findings of the FCEs in this matter.

The Contentions of the Parties

Claimant contends he was temporarily totally disabled from August 12, 1997 through February 1, 2000, when he reached maximum medical improvement and permanently totally disabled from February 2, 2000 to the present and continuing. He seeks an adjustment in his compensation rate each October 1 under Section 10(f) of the Act.

Claimant also requests a finding that he is entitled to medical treatment pursuant to Section 7 of the Act for all reasonable and necessary medical treatment by or at the direction of Dr. Pawan Grover and Dr. Carlos Hernandez, including radiofrequency lesioning and medications. He asserts he is due $1,365.40 for out-of-pocket medical expenses. (CX-21).

Claimant contends that his average weekly wage is $373.47, based on his earnings during a 21.71 week-period before his accident/injury, but excluding the remaining weeks of the 52- week period before his accident/injury while he was out of the labor market due to an earlier knee injury.

He seeks penalties under Section 14(e) for all payments due and owing from August 17, 1998 until September 30, 2002 which were not paid by Employer/Carrier.

Employer/Carrier contend there are very few objective signs of any injury to Claimant who has subjectively complained of pain and exhibited drug-seeking behavior over the course of the last five years. A Functional Capacity Evaluation revealed Claimant to be a type-three symptom magnifier with multiple complaints and inconsistencies which made it difficult to determine an accurate workload for Claimant.

Employer/Carrier also contend that Claimant's psychological testing revealed him to have an addictive personality who has engaged in repeated patterns of behavior involving extended periods of complaints of pain with little objective signs of injury, but with continued requests for narcotic medication. They assert the true source of Claimant's pain complaints is "compensationitis."

IV. DISCUSSION

It has been consistently held that the Act must be construed liberally in favor of the Claimant. Voris v. Eikel, 346 U.S. 328, 333 (1953); J. B. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion. Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251 (1994), aff'g. 990 F.2d 730 (3rd Cir. 1993).

In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners. Duhagon v. Metropolitan Stevedore Company, 31 BRBS 98, 101 (1997); Avondale Shipyards, Inc. v. Kennel, 914 F.2d 88, 91 (5th Cir. 1988); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 551 F.2d 898, 900 (5th Cir. 1981); Bank v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 929 (1968).

Based on the stipulations of the parties, Claimant's work injury of August 11, 1997 is undisputed.

Thus, Claimant has established a **prima facie** case that he suffered an "injury" under the Act, having established that he suffered a harm or pain on August 11, 1997, and that his working conditions and activities on that date could have caused the harm or pain sufficient to invoke the Section 20(a) presumption. Cairns v. Matson Terminals, Inc., 21 BRBS 252 (1988).

A. Nature and Extent of Disability

Having found that Claimant suffers from a compensable injury, the burden of proving the nature and extent of his disability rests with the Claimant. Trask v. Lockheed Shipbuilding Construction Co., 17 BRBS 56, 59 (1980).

Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The permanency of any disability is a medical rather than an economic concept.

Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, for Claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Thus, disability requires a causal connection between a worker's physical injury and his inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage earning capacity.

Permanent disability is a disability that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. Watson v. Gulf Stevedore Corp., 400 F.2d 649, pet. for reh'g denied sub nom. Young & Co. v. Shea, 404 F.2d 1059 (5th Cir. 1968)(per curiam), cert. denied, 394 U.S. 876 (1969); SGS Control Services v. Director, OWCP, 86 F.3d 438, 444 (5th Cir. 1996). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. Trask, supra, at 60. Any disability suffered by Claimant before reaching maximum medical improvement is considered temporary in nature. Berkstresser v. Washington Metropolitan Area Transit Authority, 16 BRBS 231 (1984); SGS Control Services v. Director, OWCP, supra, at 443.

The question of extent of disability is an economic as well as a medical concept. Quick v. Martin, 397 F.2d 644 (D.C. Cir 1968); Eastern S.S. Lines v. Monahan, 110 F.2d 840 (1st Cir. 1940); Rinaldi v. General Dynamics Corporation, 25 BRBS 128, 131 (1991).

To establish a **prima facie** case of total disability, the claimant must show that he is unable to return to his regular or usual employment due to his work-related injury. Elliott v. C & P Telephone Co., 16 BRBS 89 (1984); Harrison v. Todd Pacific Shipyards Corp., 21 BRBS 339 (1988); Louisiana Insurance Guaranty Association v. Abbott, 40 F.3d 122, 125 (5th Cir. 1994).

Claimant's present medical restrictions must be compared with the specific requirements of his usual or former employment to determine whether the claim is for temporary total or permanent total disability. Curit v. Bath Iron Works Corp., 22 BRBS 100 (1988). Once Claimant is capable of performing his usual

employment, he suffers no loss of wage earning capacity and is no longer disabled under the Act.

B. Maximum Medical Improvement (MMI)

The traditional method for determining whether an injury is permanent or temporary is the date of maximum medical improvement. See Turney v. Bethlehem Steel Corp., 17 BRBS 232, 235, n. 5 (1985); Trask v. Lockheed Shipbuilding Construction Co., supra; Stevens v. Lockheed Shipbuilding Company, 22 BRBS 155, 157 (1989). The date of maximum medical improvement is a question of fact based upon the medical evidence of record. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 186 (1988); Williams v. General Dynamics Corp., 10 BRBS 915 (1979).

An employee reaches maximum medical improvement when his condition becomes stabilized. Cherry v. Newport News Shipbuilding & Dry Dock Co., 8 BRBS 857 (1978); Thompson v. Quinton Enterprises, Limited, 14 BRBS 395, 401 (1981).

In the present matter, nature and extent of disability and maximum medical improvement will be treated concurrently for purposes of explication.

C. Credibility

An administrative law judge has the discretion to determine the credibility of witnesses. Furthermore, an administrative law judge may accept a claimant's testimony as credible, despite inconsistencies, if the record provides substantial evidence of the claimant's injury. Kubin v. Pro-Football, Inc., 29 BRBS 117, 120 (1995); see also Plaquemines Equipment & Machine Co. v. Neuman, 460 F.2d 1241, 1243 (5th Cir. 1972).

Employer/Carrier argue that Claimant's credibility is undermined by his actions and inactions in this matter, such as engaging in symptom magnification, manipulation and deception for secondary gain. They stress that Claimant has continued to complain of pain despite normal physical findings and negative diagnostic test results. It is urged that Claimant is engaged in drug-seeking behavior and "compensationitis," and should not be awarded any further compensation or medical benefits after October 1, 2002, when Employer/Carrier controverted this matter.

A review of the records and reports of treating and consulting physicians clearly exhibit that Claimant failed to reveal past medical, social or psychological information that may have been relevant to the physician's opinions and conclusions.

Despite being treated for 17 months for a back injury sustained in May 1985, Claimant denied any past history of back pain or injury when examined by Dr. Perry.

Claimant practiced deception on Dr. Grover by not divulging his history of past injuries and past medications, his history of alcohol usage/abuse, substance abuse and smoking. He failed to disclose his past psychiatric and psychological counseling. Dr. Grover was not aware Claimant had represented himself as a "recovering addict," nor did he inform Dr. Grover that he was previously terminated from employment for violating an employer's alcohol and drug policy. Dr. Grover was not aware that Claimant drank alcohol during his treatment, smoked marijuana and tested positive for marijuana use. Claimant never informed Dr. Grover he had attended NA and AA meetings. Given the foregoing, Dr. Grover's opinions about Claimant are diminished in value since they were rendered with lack of a complete foundation. I so find.

Similarly, based on Claimant's representations, Dr. Hernandez concluded that Claimant had attended counseling for anger and anxiety after his 1997 job injury as opposed to 1994 and 1995. Claimant informed Dr. Hernandez that he had used, but stopped, marijuana use three years before his May 15, 2000 initial visit even though Claimant tested positive for marijuana use on the same day as his visit, May 15, 2000. Although he recanted such testimony and stated instead that Claimant had related he used marijuana two to three times a year, Claimant testified at the hearing he used marijuana an average of five times a month. Dr. Hernandez was unaware of Claimant's attendance at NA and AA meetings. He conducted no psychological testing of Claimant, but instead attributed his depression to information Claimant related in his initial history. Dr. Hernandez was not aware of Claimant's history of addiction, past injuries and drug-seeking behavior. All of the above, if known, may have affected the conclusions and opinions of Dr. Hernandez. Thus, I place less weight on the opinions of Dr. Hernandez where not otherwise corroborated.

On the other hand, Dr. Perez at times rendered medical opinions which I do not credit. Initially, he stated he could not render an opinion whether Claimant's pain is work-related because it was a medical determination, but subsequently stated, based on "psychological probability," such pain complaints are not work-related **based on the medical facts.** He was of the opinion, contrary to Dr. Degner, that Claimant was dependent on Oxycontin. Dr. Perez's opinions are thus discounted in these areas.

I find that the internal inconsistencies apparent in Claimant's testimony when compared with the discrepancies with his medical, social and psychological histories raise significant

questions about Claimant's credibility and the weight to be accorded his testimony. Claimant's testimony and credibility are adversely diminished by such contradictions and discrepancies and are entitled to less credence where not otherwise supported by corroborative medical evidence.

D. The Physiological Injury

As noted, Dr. Ramos diagnosed Claimant with an upper back strain as a result of his August 11, 1997 injury and returned him to modified work.

Dr. Perry detected no spasm or tenderness, found Claimant's neurological examination normal and X-rays negative throughout his treatment of Claimant. It is observed that Claimant specifically denied to Dr. Perry any past history of back pain or injury. Dr. Perry opined that Claimant's thoracic MRI revealed an abnormality which "could be associated with pain." Dr. Perry recommended a second opinion with Dr. Raggio, but took Claimant off work until the examination.

Dr. Raggio opined that Claimant's neurologic examination was "completely normal." On MRI scan, he noted a disc abnormality at T6-7 and T8-9 for which he recommended a thoracic myelogram. The November 11, 1997 CT scan disclosed an extradural mass at T6-7 consistent with a herniated disc. Dr. Raggio further opined a thoracic discectomy was the best approach to relieve Claimant's symptoms. He further commented that since Claimant had no neurologic deficit and "a pure pain problem," surgery would be best for his comfort. Dr. Raggio did not review any later diagnostic studies and ultimately is the only physician who has recommended surgery for Claimant.

Dr. Larkins reviewed X-rays, which he interpreted as revealing no gross abnormality, and the myelogram/CT scan of November 11, 1997, which he concluded disclosed impingement of the thecal sac at T-8. He detected no spasm and opined Claimant's neurologic examination was negative. He diagnosed thoracolumbar strain. He concluded the surgery recommended by Dr. Raggio was not indicated because Claimant had "no long track signs and no myelopathy (functional disturbance and/or pathological change in the spinal cord)." He believed the yield of the proposed procedure was not high but the risks were very significant. He noted Claimant may benefit from selective nerve root blocks through pain management and, if successful, "ablating (separating or detaching) the nerve root would be less of a procedure than thoracic diskectomy."

Dr. Angel is the only physician who declared Claimant did not report radicular pain. He detected no spasm, found negative

straight leg raising and a negative neurologic exam. He reviewed the September 24, 1997 MRI which he interpreted as showing a herniated disc at T6-7. He noted the CT scan of November 11, 1997, revealed a central disc bulge at T6-7, but the foramen was not compromised. He concluded that if Claimant had an impingement at the T6-7 region, he would have radicular pain radiating around his chest. He concurred with Dr. Larkins that Claimant had no operable lesion. He too opined that a trial of epidural steriods may be considered. He is the only physician to opine that Claimant reached MMI as early as July 1, 1998. He recommended an FCE since Claimant was employable, limited only by his pain.

Dr. Clifton noted a disc extrusion at T6-7 on Claimant's November 11, 1997 myelogram and initially opined that surgery was warranted, but requested a clearer quality thoracic and lumbar MRI. Subsequent to the December 1999 thoracic MRI, Dr. Clifton opined no significant disc herniations were shown and on that basis concluded surgery was not warranted. On November 8, 2000, Dr. Clifton expressed doubt that Claimant could return to sedentary work because of an extremely limited range of motion in the cervical, thoracic and lumbar spines.

Dr. Levinthal reviewed May 1999 diagnostic studies and concluded that there were defects at T6-7 and T7-8, but of no significance with no focal nerve compression nor cord compression. When he examined Claimant on November 9, 1999, Claimant complained of radiating pain around his chest, but his physical and neurologic exams were normal. He opined Claimant had not yet reached MMI. Dr. Levinthal deferred final opinion until a better quality thoracic MRI could be obtained. After reviewing the December 7, 1999 thoracic MRI, he noted small defects at T5-6, T6-7 and T8-9 not touching the cord or causing focal nerve compression. He opined there was nothing pathological and no surgical intervention was warranted. He further opined that Claimant's pain precludes a return to his former job, but he needed to be weaned off narcotic medications. He found no neurological or objective basis to limit Claimant in his activities. He concluded, without explication, that Claimant did not need further treatment from Dr. Grover. He believed Claimant was capable of sedentary, office-type work as of February 1, 2000, and had probably reached MMI with permanent restrictions of no lifting over 20 pounds, no prolonged bending, standing or stooping.

Dr. Fillmore examined Claimant on May 17, 2000, and found a normal neurologic exam and would not recommend surgery. He recommended reviewing spinal studies, weaning Claimant off narcotic medications and completion of a chronic pain management program. On April 4, 2002, Dr. Fillmore noted multi-level thoracic and lumbar problems including T7-8 and T8-9 disc bulges, but with a

normal, intact neurologic exam. He could not find anything wrong with Claimant who had very minimal objective findings and was magnifying his symptoms. He recommended continued treatment with Dr. Hernandez which he considered to be reasonable and necessary and "maintenance care" with Dr. Grover, but not continued invasive anesthesia procedures, including radiofrequency lesioning. He too concluded Claimant had reached MMI as of February 1, 2000. His opinions regarding Claimant's return to work vacillated and were internally contradictory, ranging from a gradual integration back to work, no work while taking medications, a return to full-time work with restrictions of no pushing, pulling or lifting over 15 pounds secondary to his job injury to a return to his heavy former job as an outside machinist.

Based on the foregoing, the consensus of reasoned medical opinions based on all diagnostic testing available, I find and conclude that surgical intervention is not warranted for Claimant for the reasons noted above. In the absence of neurological compromise, no physician has recommended surgery which is considered to yield low results and high risks. Accordingly, Claimant's request for surgical intervention is hereby **DENIED.**

Moreover, based on the foregoing opinions, I find and conclude, consistent with the opinions of Drs. Grover, Fillmore and Levinthal, that Claimant reached maximum medical improvement on February 1, 2000 for his physical injury. Dr. Angel's opinion that Claimant reached MMI on July 1, 1998, is rejected in view of his recommendation for and the continuing medical treatment received by Claimant thereafter.

E. Pain Management and the Psychological Ramifications

As argued by Employer/Carrier, Dr. Grover's history from Claimant and its omissions makes his opinions regarding Claimant circumspect. Dr. Perez opined that Claimant engaged in deceptive behavior by failing or refusing to divulge information about his medical, psychological and social background.

In contrast to Dr. Hernandez's psychiatric opinions, Dr. Perez rendered selective opinions about Claimant's plight. He was not provided the records of Drs. Perry or Raggio. He relied upon the records of Drs. Haig, Reid and Clark that in the past Claimant presented with physical complaints out of proportion to his objective findings. He opined Claimant was again indulging in such deceptive conduct in this matter by engaging in chronic patterns of behavior such as drug-seeking behavior, symptom magnification and secondary gain factors. He concluded that Claimant's pain complaints are behavioral in nature and not physiological, thus reinforcing his addictive behavior. He opined

there was no evidence of depression in Claimant. To the contrary, Dr. Fillmore opined Claimant's depression and insomnia were related to his chronic pain. Only he and Dr. Fillmore believed Claimant could return to his former job as an outside machinist.

Dr. Hernandez observed no evidence that Claimant was malingering. He explained Claimant's depression was caused and prolonged by a chronicity of stressors, including his chronic pain emanating from his work injury and his inability to return to work. Dr. Hernandez's opinion that Claimant's need for psychotropic drugs is directly related **in part** to his job injury is uncontradicted. As is his opinion that Claimant cannot tolerate work stresses unless he is stable on his medications. However, Dr. Hernandez never restricted Claimant from returning to work. Dr. Hernandez's prognosis for future treatment and medication management is uncontradicted, however his projected lengths of care are unexplained and therefore not considered reasoned.

Drs. Grover and Fillmore opined that Claimant's psychological treatment by Dr. Hernandez is related in part to the sequelae of his job injury and continued treatment is reasonable and necessary. I so find and conclude.

Initially, Dr. Grover opined that Claimant's source of pain was muscular in nature since marked tenderness and trigger points were detected in the facet joints and facet injections were positive providing complete relief. He diagnosed Claimant with chronic pain syndrome related to his August 11, 1997 job injury. Radiofrequency lesioning also provided pain improvement. In the absence of a neurological option, Dr. Grover was of the sole opinion that radiofrequency lesioning was the only option remaining for Claimant. Radiofrequency lesioning involves cauterizing the nerve to the facet joint providing long-term nerve block relief. Dr. Grover noted that, if successful, Claimant could then begin working on his muscle groups and become more active. Drs. Larkins and Angel expressed agreement with ablation or epidural injection of the facet nerves. Dr. Grover found no signs of malingering, symptom magnification or drug-seeking behavior. Dr. Grover relied upon the opinion of Dr. Degner that Claimant did not need drug detoxification, was not addictive and was not abusing medications.

Consistent with the opinions of Drs. Grover, Hernandez, Degner, Fillmore and Larkins, I find and conclude that Claimant suffers from chronic pain syndrome attributable **in part** to his work-related accident/injury. Although Dr. Levinthal opined that no further treatment by Dr. Grover is recommended, I find his opinion unreasoned since it is not explained or supported. Thus, I find Dr. Levinthal's recommendation that Claimant continue with only maintenance care, two to three times a year, also unreasoned

since it too is not explained or further supported. I further find, in conformity with the opinion of Dr. Levinthal and the July 15, 2002 FCE, that Claimant retained the physical capacity to perform work at the sedentary to light work level commencing February 1, 2000, when he reached maximum medical improvement. The consensus of rational and credible medical opinions of record clearly support a conclusion that Claimant cannot return to his former heavy work as an outside machinist. I so find and conclude.

Employer/Carrier's denial of continuing compensation and medical benefits to Claimant on October 1, 2002, based on his refusal to undergo detoxification is not rationally supported by the record. Claimant was never directed to undergo detoxification. Claimant was referred to Dr. Degner for evaluation of "possible opiate detoxification," not for "drug detoxification" as suggested by Employer/Carrier. (EX-59, p. 1). Although Dr. Degner suggested Claimant could voluntarily undergo such a program, after which he could be presented alternative approaches to pain management, Dr. Degner concomitantly concluded Claimant was not abusing his medications. Dr. Grover never concurred that Claimant should undergo a detoxification program. To the extent Employer/Carrier terminated Claimant's compensation and medical benefits for his alleged refusal to attend drug detoxification, they acted unreasonably and should re-institute such benefits.

Dr. Grover opined that radiofrequency lesioning was the only viable option remaining in his pain management approach. Employer/Carrier unreasonably refused to approve such continuing procedure notwithstanding its initial success. The record is devoid of any reasonable explanation for the denial of the procedure. Accordingly, I find and conclude that Employer/Carrier remain responsible for continuing compensation to Claimant and medical care by Dr. Grover, to include radiofrequency lesioning for possible improvement in Claimant's physical status in an effort to return him to gainful employment.

Accordingly, I find and conclude that Claimant is entitled to temporary total disability compensation benefits from August 12, 1997 to February 1, 2000, exclusive of any wages earned performing modified work provided by Employer, based on an average weekly wage of $373.47, as calculated below.

F. Suitable Alternative Employment

If the claimant is successful in establishing a **prima facie** case of total disability, as here, the burden of proof is shifted to employer to establish suitable alternative employment. New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1038 (5th Cir. 1981). Addressing the issue of job availability, the Fifth

Circuit has developed a two-part test by which an employer can meet its burden:

> (1) Considering claimant's age, background, etc., what can the claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do?
>
> (2) Within the category of jobs that the claimant is reasonably capable of performing, are there reasonably available in the community for which the claimant is able to compete and which he reasonably and likely could secure?

Id. at 1042. Turner does not require that employers find specific jobs for a claimant; instead, the employer may simply demonstrate "the availability of general job openings in certain fields in the surrounding community." P & M Crane Co. v. Hayes, 930 F.2d 424, 431 (1991); Avondale Shipyards, Inc. v. Guidry, 967 F.2d 1039 (5th Cir. 1992).

However, the employer must establish **the precise nature and terms** of job opportunities it contends constitute suitable alternative employment in order for the administrative law judge to rationally determine if the claimant is physically and mentally capable of performing the work and that it is realistically available. Piunti v. ITO Corporation of Baltimore, 23 BRBS 367, 370 (1990); Thompson v. Lockheed Shipbuilding & Construction Company, 21 BRBS 94, 97 (1988).

The administrative law judge must compare the jobs' requirements identified by the vocational expert with the claimant's physical and mental restrictions based on the medical opinions of record. Villasenor v. Marine Maintenance Industries, Inc., 17 BRBS 99 (1985); See generally Bryant v. Carolina Shipping Co., Inc., 25 BRBS 294 (1992); Fox v. West State, Inc., 31 BRBS 118 (1997). Should the requirements of the jobs be absent, the administrative law judge will be unable to determine if claimant is physically capable of performing the identified jobs. See generally P & M Crane Co., 930 F.2d at 431; Villasenor, supra. Furthermore, a showing of only one job opportunity may suffice under appropriate circumstances, for example, where the job calls for **special skills** which the claimant possesses and there are few qualified workers in the local community. P & M Crane Co., 930 F.2d at 430. Conversely, a showing of one **unskilled** job may not satisfy Employer's burden.

Once the employer demonstrates the existence of suitable alternative employment, as defined by the Turner criteria, the claimant can nonetheless establish total disability by demonstrating that he tried with reasonable diligence to secure such employment and was unsuccessful. Turner, 661 F.2d at 1042-1043; P & M Crane Co., 930 F.2d at 430. Thus, a claimant may be found totally disabled under the Act "when physically capable of performing certain work but otherwise unable to secure that particular kind of work." Turner, 661 F.2d at 1038, quoting Diamond M. Drilling Co. v. Marshall, 577 F.2d 1003 (5th Cir. 1978).

The Benefits Review Board has announced that a showing of available suitable alternate employment may not be applied retroactively to the date the injured employee reached MMI and that an injured employee's total disability becomes partial on the earliest date that the employer shows suitable alternate employment to be available. Rinaldi v. General Dynamics Corporation, 25 BRBS at 131 (1991).

Based on the July 15, 2002 FCE, and the opinion of Dr. Levinthal, I find that Claimant could perform sedentary to light work with no lifting greater than 20 pounds, no prolonged bending, standing or stooping. The 2000 FCE recognized Claimant's limited ability to perform upper extremity activities and that he would need to work limited hours and have frequent breaks to perform gainful employment. I find that Mr. Quintanilla's testimony, evidence and labor market survey, when compared to Claimant's limitations and restrictions, are not persuasive in establishing that the jobs identified for Claimant constitute suitable alternative employment.

Mr. Quintanilla performed a historical survey as of July 1998 and a current survey as of January 6, 2003. The historical survey was based upon a review of jobs published in local newspapers. Mr. Quintanilla acknowledged that no medical restrictions from any physician had been assigned to Claimant as of July 1998. Moreover, no specific job demands or requirements were identified for the employers of each generic job found. Mr. Quintanilla's failure to describe the precise nature and terms of the physical requirements of the various general jobs in the historical survey precludes a comparison of the jobs' requirements with Claimant's physical and mental capabilities based on the medical opinions of record. Therefore, I find the jobs set forth in the historical survey do not constitute suitable alternative employment.

Of the two jobs identified on January 6, 2003, Mr. Quintanilla identified an assembly worker position at a cleaners which required Claimant to perform work in a standing position. Although Mr. Quintanilla testified that a possible accommodation may be extended

to allow the worker to use a stool while assembling, Mr. Kramberg contradicted such belief by reporting that sitting was only allowed at lunch time. Mr. Quintanilla did not consider any limitations on Claimant working with his arms extended for any length of time. I find that the assembler position exceeds the limitations assigned by Dr. Levinthal and the parameters of both FCEs. Therefore, I find and conclude the assembler position does not constitute suitable alternative employment.

Mr. Quintanilla also identified a cashier job at Longhorn Travel Plaza which purportedly required no lifting and allowed sitting on the employee's off time or when "things are slow." No other specifics of the job demands were reported. Mr. Kramberg's follow-up of this position revealed there were no openings since the position was filled before Christmas 2002. The job required "mostly standing" and an employee could sit only during breaks. The facility manager informed Mr. Kramberg that the cashier position required lifting up to 50 pounds to perform stocking. The standing and lifting requirements reported by Mr. Kramberg exceeded the FCE limits and therefore I find and conclude that the cashier job is inappropriate for Claimant and does not constitute suitable alternative employment.

Accordingly, I find and conclude that none of the generic or current jobs identified by Mr. Quintanilla constitute suitable alternative employment within Claimant's restrictions and limitations. Consequently, I find and conclude that Employer/Carrier failed to establish suitable alternative employment.

G. Average Weekly Wage

Section 10 of the Act sets forth three alternative methods for calculating a claimant's average **annual** earnings, 33 U.S.C. § 910 (a)-(c), which are then divided by 52, pursuant to Section 10(d), to arrive at an average **weekly** wage. The computation methods are directed towards establishing a claimant's earning power at the time of injury. SGS Control Services v. Director, OWCP, supra, at 441; Johnson v. Newport News Shipbuilding & Dry Dock Co., 25 BRBS 340 (1992); Lobus v. I.T.O. Corp., 24 BRBS 137 (1990); Barber v. Tri-State Terminals, Inc., 3 BRBS 244 (1976), aff'd sum nom. Tri-State Terminals, Inc. v. Jesse, 596 F.2d 752, 10 BRBS 700 (7th Cir. 1979).

Section 10(a) provides that when the employee has worked in the same employment for substantially the whole of the year immediately preceding the injury, his annual earnings are computed using his actual **daily** wage. 33 U.S.C. § 910(a). Section 10(b) provides that if the employee has not worked substantially the

whole of the preceding year, his average annual earnings are based on the average daily wage of any employee in the same class who has worked substantially the whole of the year. 33 U.S.C. § 910(b). But, if neither of these two methods "can reasonably and fairly be applied" to determine an employee's average annual earnings, then resort to Section 10(c) is appropriate. Empire United Stevedore v. Gatlin, 935 F.2d 819, 821, 25 BRBS 26 (CRT) (5th Cir. 1991).

Subsections 10(a) and 10(b) both require a determination of an average daily wage to be multiplied by 300 days for a 6-day worker and by 260 days for a 5-day worker in order to determine average annual earnings.

In Miranda v. Excavation Construction Inc., 13 BRBS 882 (1981), the Board held that a worker's average wage should be based on his earnings for the seven or eight weeks that he worked for the employer rather than on the entire prior year's earnings because a calculation based on the wages at the employment where he was injured would best adequately reflect the Claimant's earning capacity at the time of the injury.

Claimant worked only 21.71 weeks for the Employer in the year prior to his injury, which is not "substantially all of the year" as required for a calculation under subsections 10(a) and 10(b). See Lozupone v. Stephano Lozupone and Sons, 12 BRBS 148 (1979)(33 weeks is not a substantial part of the previous year); Strand v. Hansen Seaway Service, Ltd., 9 BRBS 847, 850 (1979)(36 weeks is not substantially all of the year). Cf. Duncan v. Washington Metropolitan Area Transit Authority, 24 BRBS 133, 136 (1990)(34.5 weeks is substantially all of the year; the nature of Claimant's employment must be considered, i.e., whether intermittent or permanent).

Section 10(c) of the Act provides:

> If either [subsection 10(a) or 10(b)] cannot reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee and the employment in which he was working at the time of his injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, shall reasonably represent

> the annual earning capacity of the injured employee.

33 U.S.C § 910(c).

The Administrative Law Judge has broad discretion in determining annual earning capacity under subsection 10(c). Hayes v. P & M Crane Co., supra; Hicks v. Pacific Marine & Supply Co., Ltd., 14 BRBS 549 (1981). It should also be stressed that the objective of subsection 10(c) is to reach a fair and reasonable approximation of a claimant's wage-earning capacity at the time of injury. Barber v. Tri-State Terminals, Inc., supra. Section 10(c) is used where a claimant's employment, as here, is seasonal, part-time, intermittent or discontinuous. Empire United Stevedores v. Gatlin, supra, at 822.

I conclude that because Sections 10(a) and 10(b) of the Act can not be applied, Section 10(c) is the appropriate standard under which to calculate average weekly wage in this matter.

Claimant contends that his average weekly wage should be computed under Section 10(c) by dividing his $8,108.12 earnings with Employer by the number of weeks he worked yielding a weekly wage of $373.47 ($8,108.12 ÷ 21.71 = $373.47) and a compensation rate of $248.98.

Employer/Carrier contend that Claimant's average weekly wage cannot be calculated under Section 10(a) because 21.71 weeks in not a substantial part of the year. I agree. Employer/Carrier argue that Claimant's annual earnings from 1993 through 1996 ($51,429.41) should be totaled and divided by 4 resulting in an average annual wage of $12,839.00, which when divided by 52 weeks in a year yields a weekly wage of $247.00 and a minimum compensation rate of $208.94.

Like Miranda, Claimant was earning more money for the 21.71 weeks of employment with Employer when he was injured than he earned annually in his previous four years of employment. Thus, I find, as the Board did in Miranda, that a calculation under Section 10(c)based on his increased wages at the employment where he was injured "would best adequately reflect Claimant's earning potential at the time of his injury." Accordingly, I find and conclude that Claimant's average weekly wage at the time of his injury was $373.47 ($8,108.12 ÷ 21.71 weeks = $373.47) with a corresponding compensation rate of $248.98.

H. Entitlement to Medical Care and Benefits

Section 7(a) of the Act provides that:

> The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.

33 U.S.C. § 907(a).

The Employer is liable for all medical expenses which are the natural and unavoidable result of the work injury. For medical expenses to be assessed against the Employer, the expense must be both reasonable and necessary. Pernell v. Capitol Hill Masonry, 11 BRBS 532, 539 (1979). Medical care must also be appropriate for the injury. 20 C.F.R. § 702.402.

A claimant has established a **prima facie** case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255, 257-258 (1984).

Section 7 does not require that an injury be economically disabling for claimant to be entitled to medical benefits, but only that the injury be work-related and the medical treatment be appropriate for the injury. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 187.

Entitlement to medical benefits is never time-barred where a disability is related to a compensable injury. Weber v. Seattle Crescent Container Corp., 19 BRBS 146 (1980); Wendler v. American National Red Cross, 23 BRBS 408, 414 (1990).

An employer is not liable for past medical expenses unless the claimant first requested authorization prior to obtaining medical treatment, except in the cases of emergency, neglect or refusal. Schoen v. U.S. Chamber of Commerce, 30 BRBS 103 (1997); Maryland Shipbuilding & Drydock Co. v. Jenkins, 594 F.2d 404, 10 BRBS 1 (4th Cir. 1979), rev'g 6 BRBS 550 (1977). Once an employer has refused treatment or neglected to act on claimant's request for a physician, the claimant is no longer obligated to seek authorization from employer and need only establish that the treatment subsequently procured on his own initiative was necessary for treatment of the injury. Pirozzi v. Todd Shipyards Corp., 21

BRBS 294 (1988); Rieche v. Tracor Marine, 16 BRBS 272, 275 (1984).

The employer's refusal need not be unreasonable for the employee to be released from the obligation of seeking his employer's authorization of medical treatment. See generally 33 U.S.C. § 907 (d)(1)(A). Refusal to authorize treatment or neglecting to provide treatment can only take place after there is an opportunity to provide care, such as after the claimant requests such care. Mattox v. Sun Shipbuilding & Dry Dock Co., 15 BRBS 162 (1982). Furthermore, the mere knowledge of a claimant's injury does not establish neglect or refusal if the claimant never requested care. Id.

Consistent with the foregoing discussion, I find that surgical intervention is not warranted in the present matter. However, I find that continuing pain management and psychiatric treatment are appropriate, reasonable and necessary. Specifically, additional radiofrequency lesioning recommended by Dr. Grover in an effort to improve Claimant's progress and eventual return to gainful employment should be approved and authorized. Since Claimant's depression symptomatology was, **in part**, exacerbated by his job accident and injury, continuing psychiatric care by Dr. Hernandez is deemed reasonable and necessary and the responsibility of Employer/Carrier.

Claimant's out-of-pocket expenses set forth in CX-21, pp. 1-12, totaling $2,387.15 for doctor's visits, mileage to and from such visits, pharmacy costs and parking expenses are directed to be reimbursed to Claimant by Employer/Carrier. In post-hearing brief, Employer/Carrier assert that the parties have reached an agreement that Claimant will be reimbursed an amount of $1,003.75 for mileage and parking expenses incurred before October 1, 2002, when Employer/Carrier controverted continuing compensation and medical. All expenses incurred after October 1, 2002, are also reimbursable by Employer/Carrier. Interest will be awarded on all outstanding medical expenses and benefits whether such costs were initially borne by Claimant or medical providers. See Ion v. Duluth, Missabe & Iron Range Railway Co., 31 BRBS 76 (1997).

Inherent within these findings and conclusions is a rejection of Employer/Carrier's position that compensation and medical benefits should be suspended pursuant to Section 7(d)(4) of the Act for Claimant's alleged refusal to submit to a drug detoxification program for reasons discussed above.

V. SECTION 14(e) PENALTY

Section 14(e) of the Act provides that if an employer fails to pay compensation voluntarily within 14 days after it becomes due, or within 14 days after unilaterally suspending compensation as set forth in Section 14(b), the Employer shall be liable for an additional 10% penalty of the unpaid installments. Penalties attach unless the Employer files a timely notice of controversion as provided in Section 14(d).

In the present matter, Employer/Carrier filed a Notice of Controversion on October 1, 2002. Claimant argues that Employer/Carrier should have filed a Notice of Controversion when his compensation rate was reduced from $485.14 (every two weeks) to $163.00 (every two weeks) on May 22, 2002. (EX-36, p. 1). Claimant also contends that on August 17, 1998, he proposed an increase in his average weekly wage from $363.86 to $373.47. (CX-28, p. 1), but Employer/Carrier did not file a Notice of Controversion, which should have been filed by "August 28, 1998." Therefore, Claimant seeks penalties for the difference between his compensation rate of $248.98 and the compensation rate paid of $242.57 ($485.14 ÷ 2 = $242.57) from August 17, 1998 to May 22, 2002 and penalties for underpaid compensation from August 17, 1998 to September 30, 2002.

Employer/Carrier respond that on May 16, 2002, they filed Forms LS-206 (Payment of Compensation Without Award) and LS-208 (Notice of Final Payment Or Suspension of Compensation Payments). (CX-2, pp. 7, 9). They also assert that an informal conference was held on July 30, 2002, with Claims Examiner Mack Stringfield wherein the issue of the calculation of average weekly wage was discussed. (CX-2, p. 14). Employer/Carrier correctly point out that the filing of a Notice of Suspension is the functional equivalent to the filing of a Notice of Controversion for purposes of Section 14(e) penalties. White v. Rock Creek Ginger Ale Co., 17 BRBS 75, 79 (1985); Caudill v. SEA TAC Alaska Shipbuilding, 22 BRBS 10, 15 (1988). Therefore, I find Employer/Carrier timely filed the functional equivalent of a notice of controversion on May 16, 2002. Accordingly, penalties are not appropriate for the reduction in Claimant's compensation rate on May 22, 2002.

In their response to Claimant's argument that penalties are due after his proposed increased average weekly wage, Employer/Carrier contend that the conduct of Claimant's counsel and Claimant after the proposed average weekly wage increase letter shows there was never any controversy over the amount of compensation due Claimant or that Claimant abandoned any attempt to seek increased compensation by not raising it as an issue at subsequent informal conferences.

Employer/Carrier assert that an informal conference was held on March 19, 1999, seven months after Claimant's Counsel's August 17, 1998 letter, at which Claimant did not raise the issue of a greater average weekly wage and only medical care was discussed. On September 10, 1999, another informal conference was held at which only medical follow-up was discussed and again Claimant did not raise the increased average weekly wage issue. On October 2, 2000, a third informal conference was held but Counsel for Claimant did not raise the issue of a greater average weekly wage. The presiding claims examiner had been copied with Claimant's August 17, 1998 letter proposing an increased average weekly wage.

Employer/Carrier rely upon National Steel & Shipbuilding Company v. U. S. Department of Labor, OWCP (Holston), 606 F.2d 875, 11 BRBS 68(CRT)(9th Cir. 1979) where the Court held that the notice requirement of Section 14(d) "is not triggered until the employer has reason to believe a controversy will arise" either because of its terminating or reducing benefits or the employee's protests, as here, with respect to compensation. Once it has reason to believe that a controversy has arisen, an employer must file a notice of controversion within 14 days or be liable for the ten percent assessment computed on all amounts unpaid between the time notice should have been filed and the time notice is filed or the time Department of Labor acquires knowledge of the facts that a proper notice would have revealed. Id., at 879. Ordinarily, the date of an informal conference may serve as a cutoff point for calculation of a Section 14(e) penalty where Department of Labor is provided the required information to constitute proper notice.

Section 14(d) specifically requires that the **employer** controvert a claim by filing a notice of controversion which must include a statement that the right to compensation is controverted, the name of the claimant, the name of the employer, the date of the alleged injury or death and the grounds for controversion. See Ingalls Shipbuilding Inc. v. Director, OWCP (Fairley), 898 F.2d 1088, 1095, 23 BRBS 61, 67(CRT)(5th Cir. 1990), rev'd on other grounds sub nom. Bath Iron Works Corp. v. Director, OWCP, 506 U.S. 153, 26 BRBS 151(CRT)(1993)(must specify grounds for controversion). The fact that the claimant and his attorney are aware of the employer's position does not affect the duty to file a notice of controversion as an **employer** must show that the Department of Labor has been notified and is aware of its position. Rowe v. Western Pacific Dredging, 12 BRBS 427, 434 (1980), overruled in part on other grounds by Vlasic v. American President Lines, 20 BRBS 188 (1987).

I find and conclude that Employer/Carrier should have had reason to believe a controversy existed when it received notice of Claimant's proposed increase in average weekly wage on or about

August 17, 1998. Contrary to Employer/Carrier's contention, the regulations and jurisprudence do not place the burden on Claimant to raise the controversy at subsequent informal conferences. It was clearly Employer/Carrier's burden, once faced with Claimant's proposed increased average weekly wage, to either pay the disputed amount or file a notice of controversion or notify the Department of Labor of the reasons/grounds for its controversion to avoid a Section 14(e) penalty. The record is devoid of any evidence that Employer/Carrier did so at any of the above-mentioned three informal conferences held after the August 17, 1998 proposal. However, at the July 30, 2002 informal conference, the Department of Labor was informed of Employer/Carrier's grounds for controverting Claimant's request for an increased average weekly wage. The Department of Labor was notified of all the salient requirements for proper notice of controversion under Section 14(d) regarding Claimant's proposed increased average weekly wage. I so find.

I find and conclude that once informed of Claimant's proposed increased average weekly wage on August 17, 1998, Employer/Carrier had 28 days to either pay Claimant the disputed additional compensation, commencing as of the date of his job injury, or file a notice of controversion to avoid the imposition of a Section 14(e) penalty. Browder v. Dillingham Ship Repair, 25 BRBS 88, 90 (1991). A notice of controversion should have been filed by September 14, 1998 to be timely and prevent the application of penalties. Since I have found and concluded that the average weekly wage issue presented and discussed at the July 30, 2002 informal conference constituted the equivalent of a timely notice of controversion, Employer/Carrier are liable for Section 14(e) penalties for the difference between the compensation paid to Claimant and the compensation Claimant is owed based on his average weekly wage of $373.47 from August 12, 1997 until July 30, 2002.

VI. COST OF LIVING INCREASES

Section 10(f) provides that in all injuries which result in permanent total disability or death, compensation shall be adjusted annually to reflect the rise in the national average weekly wage. 33 U.S.C. § 910(f); Phillips v. Marine Concrete Structures, Inc., 895 F.2d 1033, 1035 (5th Cir. 1990). Accordingly, upon reaching a state of permanent and total disability on February 2, 2000, Claimant is entitled to annual cost of living increases, which rate is adjusted commencing October 1 of every year, and shall commence October 1, 2000. This increase shall be the lesser of the percentage that the national average weekly wage had increased from the preceding year or five percent, and shall be computed by the District Director.

VII. INTEREST

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. Avallone v. Todd Shipyards Corp., 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. Watkins v. Newport News Shipbuilding & Dry Dock Co., aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that ". . . the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . . ." Grant v. Portland Stevedoring Company, et al., 16 BRBS 267 (1984). This order incorporates by reference this statute and provides for its specific administrative application by the District Director. See Grant v. Portland Stevedoring Company, et al., 17 BRBS 20 (1985). The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

VIII. ATTORNEY'S FEES

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Since Counsel for Claimant has achieved success in this matter, Counsel is hereby allowed thirty (30) days from the date of service of this decision to submit an application for attorney's fees.[5] A service sheet showing that service has been made on all parties, including the Claimant, must accompany

[5] Counsel for Claimant should be aware that an attorney's fee award approved by an administrative law judge compensates only the hours of work expended between the close of the informal conference proceedings and the issuance of the administrative law judge's Decision and Order. Revoir v. General Dynamics Corp., 12 BRBS 524 (1980). The Board has determined that the letter of referral of the case from the District Director to the Office of the Administrative Law Judges provides the clearest indication of the date when informal proceedings terminate. Miller v. Prolerized New England Co., 14 BRBS 811, 813 (1981), aff'd, 691 F.2d 45 (1st Cir. 1982). Thus, Counsel for Claimant is entitled to a fee award for services rendered after **August 27, 2002**, the date this matter was referred from the District Director.

the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

VIII. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following Order:

1. Employer/Carrier shall pay Claimant compensation for temporary total disability from August 12, 1997 to February 1, 2000, based on Claimant's average weekly wage of $373.47, in accordance with the provisions of Section 8(b) of the Act. 33 U.S.C. § 908(b).

2. Employer/Carrier shall pay Claimant compensation for permanent total disability from February 2, 2000 to present and continuing thereafter based on Claimant's average weekly wage of $373.47, in accordance with the provisions of Section 8(a) of the Act. 33 U.S.C. § 908(a).

4. Employer/Carrier shall pay all reasonable, appropriate and necessary medical expenses arising from Claimant's August 11, 1997 work injury, pursuant to the provisions of Section 7 of the Act, consistent with this Decision and Order.

5. Employer/Carrier shall pay to Claimant the annual compensation benefits increase pursuant to Section 10(f) of the Act effective October 1, 2000, for the applicable period of permanent total disability.

6. Employer shall be liable for an assessment under Section 14(e) of the Act to the extent that the installments found to be due and owing prior to July 30, 2002, as provided herein, exceed the sums which were actually paid to Claimant.

7. Employer shall receive credit for all compensation heretofore paid, as and when paid.

8. Employer shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961 (1982); Grant v. Portland Stevedoring Co., et al., 16 BRBS 267 (1984).

9. Claimant's attorney shall have thirty (30) days from the date of service of this Decision and Order by the District Director to file a fully supported and verified fee application with the Office of Administrative Law Judges; a copy must be served on

Claimant and opposing counsel who shall then have twenty (20) days to file any objections thereto.

ORDERED this 7th day of November, 2003, at Metairie, Louisiana.

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LEE J. ROMERO, JR.
Administrative Law Judge